OFFICIAL CODE OF GEORGIA ANNOTATED

2015 Supplement

Including Acts of the 2015 Regular Session of the General Assembly

Prepared by

The Code Revision Commission

The Office of Legislative Counsel

and

The Editorial Staff of LexisNexis®

Published Under Authority of the State of Georgia

Volume 14

2011 Edition

Title 16. Crimes and Offenses (Chapters 1—6)

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

Place in Pocket of Corresponding Volume of Main Set

LexisNexis®
Charlottesville, Virginia

ISBN 978-0-327-11074-3 (set)
ISBN 978-1-4224-9384-7

5013432

(Pub.41805)

THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 16

CRIMES AND OFFENSES

VOLUME 14

Chap.

VOLUME 14A

VOLUME 14B

Law reviews. — For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

CHAPTER 1

GENERAL PROVISIONS

16-1-3. Definitions.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Term "property." — Taxpayers were not entitled to a theft loss under 26 U.S.C.S. § 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpayer of the property at issue. Although corporate stock, which was in the taxpayer's control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

False swearing constituted a felony. — Defendant was not entitled to relief from defendant's sentence for false swearing, in violation of O.C.G.A. § 21-2-565, because the rule of lenity did not apply in that there was no uncertainty as to the applicable sentence for the crime, and the imposition of a five-year sentence was appropriate and within the sentencing range, under O.C.G.A. § 16-10-71, for the offense, which constituted a felony under O.C.G.A. § 16-1-3. Hogan v. State, 316 Ga. App. 708, 730 S.E.2d 178 (2012).

Cited in DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011); Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012); State v. Ogilvie, 292 Ga. 6, 734 S.E.2d 50 (2012); State v. Newton, 294 Ga. 767, 755 S.E.2d 786 (2014); Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014).

Public Place

Jail is not a public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

Burglary from office which was not public. — Jury was authorized to conclude that the defendant was "without authority" to enter the victim's office as the evidence did not show that the building where the offense occurred was open to the public and the victim's purse was located in the victim's private office; thus, sufficient evidence supported the defendant's burglary conviction. Streeter v. State, 331 Ga. App. 322, 771 S.E.2d 33 (2015).

Prosecution

Return of second indictment. — Trial court did not err in finding that the

state had the ability to bring the second indictment against the defendant because the first appeal filed concerned the issue of whether the first indictment was read in open court as required under Georgia law whereas the second indictment initiated a completely separate prosecution on the same charges and no contention was raised that the second indictment suffered from the same infirmity as the first indictment. Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. Morris v. State, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

16-1-4. When conduct constitutes a crime; power of court to punish contempt or enforce orders, civil judgments, and decrees.

JUDICIAL DECISIONS

Criminal contempt conviction reversed. — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering the defendant to testify and neither court made a finding that the defendant's testimony was "necessary to the public interest" as required by former O.C.G.A. § 24-9-28 (see now O.C.G.A. § 24-5-507); the state had to grant a valid immunity as broad in scope as the privilege it replaced and to show the applicability of that state immunity to the witness. In re Long, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

16-1-6. Conviction for lesser included offenses.

JUDICIAL DECISIONS

Analysis

General Consideration

Applicability to crimes.

Accused may be convicted of a crime included in a crime charged in the indictment or accusation, and that a crime is so included when it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged. Morast v. State, 323 Ga. App. 808, 748 S.E.2d 287 (2013).

Defendant on notice of lesser included crimes.

Trial court did not err in failing to merge the defendant's convictions for the

General Consideration (Cont'd)

criminal damage to property in the first degree and criminal damage to property in the second degree because, although the charges were defined by degrees, the statutes prohibited different risks of injury — knowing interference with property in a manner that endangered human life and a certain level of damage to the property. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

Cited in State v. Wilson, No. A12A1122, 2012 Ga. App. LEXIS 793 (Sept. 25, 2012); State v. Pruiett, 324 Ga. App. 789, 751 S.E.2d 579 (2013); State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Armed Robbery

Separate convictions for armed robbery and aggravated assault were barred, etc.

Aggravated assault and armed robbery convictions merged as the assault count did not require proof of any fact not required to prove armed robbery. Newsome v. State, 324 Ga. App. 665, 751 S.E.2d 474 (2013).

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Assault

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the assault required proof of a less serious injury than the aggravated battery. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge into aggravated battery. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. Reynolds v. State, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Aggravated assault and kidnapping. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. Reynolds v. State, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Terroristic threats and aggravated assault with deadly weapon.

Contrary to the defendant's claim, the convictions for terroristic threats and aggravated assault should not have merged as aggravated assault required proof of an assault with a knife, while terroristic threats required proof that the defendant

threatened to murder the victims; each crime requiring the state to prove at least one fact different from the other. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault and possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Controlled Substances

Imposition of separate trafficking sentences proper. — Trial court did not err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant's vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. Ahmad v. State, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Kidnapping

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Kidnapping and false imprisonment.

Trial court did not err in allowing the jury to consider the lesser included offense of false imprisonment after granting a directed verdict on the kidnapping charges against defendant because false imprisonment was a lesser included offense of kidnapping, and the indictment against defendant contained all the essential elements related to false imprisonment. Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Murder

Aggravated assault and malice murder.

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. Morris v. State, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Aggravated battery merged with malice murder.

Evidence of a three-year-old child's injuries and death was sufficient to support the defendant's conviction for malice murder, felony murder, aggravated assault, and aggravated battery; however, the defendant's conviction for aggravated bat-

Murder (Cont'd)

tery based on the fracture of the child's ribs should have been merged into the defendant's conviction for murder under O.C.G.A. § 16-1-6(b). Soilberry v. State, 289 Ga. 770, 716 S.E.2d 162 (2011).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. Hernandez v. State, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Aggravated battery did not merge into attempted murder. — Trial court erred in merging the conviction that required the greater injury, aggravated battery, into the conviction that required the lesser injury, attempted murder. Zamudio v. State, No. A14A2023, 2015 Ga. App. LEXIS 176 (Mar. 20, 2015).

Merger of counts follow murder and multiple victims. — Conspiracy to commit the two alleged injuries to one victim and the victim's property did not require proof of causing a second victim's death, and proof of causing the second victim's death as a result of aggravated assault did not require proof of acts for which the defendant was found guilty in two counts; thus, that portion of the sentencing order whereby the trial court merged the convictions on those counts had to be vacated. Grissom v. State, 296 Ga. 406, 768 S.E.2d 494 (2015).

Rape

Statutory rape not lesser included offense of forcible rape. — Trial court did not err in failing to instruct the jury that statutory rape was a lesser included offense of forcible rape because a conviction of statutory rape required proof that the victim was under the age of consent, while a conviction of rape required proof of force, regardless of the victim's age. Stuart v. State, 318 Ga. App. 839, 734 S.E.2d 814 (2012).

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. Smith v. State, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Child Molestation

Child molestation and aggravated sexual battery, etc.

Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. Gaston v. State, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires, O.C.G.A. § 16-6-4(a). Chandler v. State, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Other Offenses Involving Children

Cruelty to children count did not

merge with reckless driving count. — Trial court properly did not merge the appellant's convictions for cruelty to children in the second degree and serious injury by vehicle by the act of reckless driving with respect to the same victim for the purpose of sentencing because each offense required proof of a different wrongful act as the cruelty to children conviction required proof of facts not required by the serious injury by vehicle conviction and vice versa. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751 (2015).

Deprivation of minor and cruelty to children. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. Staib v. State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Other Property Offenses

First and second degree criminal damage to property do not merge. — Trial court did not err in failing to merge the defendant's convictions for the criminal damage to property charges because criminal damage to property in the first degree required evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree required evidence that the damage to property exceeded $500, neither of which was required in the other. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

Miscellaneous Crimes

Harassing phone calls and aggravated stalking. — Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Public drunkeness not included in crime of public indecency. — With regard to the defendant's conviction for felony public indecency for urinating in public, the trial court's refusal to charge the jury on public drunkenness as a lesser included offense of public indecency was not error because the crime of public drunkenness requires proof that the defendant was intoxicated, which the crime of public indecency does not; the crime of public drunkenness does not require a lewd exposure of sexual organs, which is required by the crime of public indecency; and, the crime of public indecency requires proof of exposure of sexual organs, which the crime of public drunkenness does not; therefore, the offense of public drunkeness was not included in the crime of public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

16-1-7. Multiple prosecutions for same conduct.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Attachment of jeopardy.

Trial court erred in holding that jeopardy had not attached on the previous charges filed against the defendant due to a mistrial because the defendant was placed in jeopardy when the jury was sworn in the first trial. Herrington v. State, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

Offenses not arising from same transaction.

Appellate court found that the court was compelled to uphold the trial court's denial of the defendant's double jeopardy plea in bar on the basis that the defendant did not affirmatively show the prosecutor actually knew of the other crimes when the prosecutor prosecuted the first offense. Banks v. State, 320 Ga. App. 98, 739 S.E.2d 414 (2013).

Subsequent prosecution on lesser included offense not barred. — Trial court erred by dismissing the indictment against the defendant charging voluntary manslaughter because the acquittal on the greater offense of malice murder did not preclude a retrial on the lesser offense of voluntary manslaughter. State v. Williams, 322 Ga. App. 341, 744 S.E.2d 883 (2013).

Merger claims cannot be deemed waived. — Merger claims cannot be waived, even following a guilty plea, because a conviction that merges as a matter of law or fact with another conviction is void, and any resulting sentence is void and illegal, which means that the claims may be challenged in any proper proceeding. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Cited in State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014); Spears v. State, 296 Ga. 598, 769 S.E.2d 337 (2015).

Included Crimes

2. Crimes Against the Person

Armed robbery as included offense of malice murder.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Aggravated assault. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, O.C.G.A. § 16-5-21(a)(1) and (a)(2), the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck and, thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in O.C.G.A. § 16-3-21. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated battery and aggravated assault. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was

rendered useless because the finger was repeatedly struck with a hammer. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a deliberate interval, committed an aggravated battery in a different location and on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. Brockington v. State, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Aggravated assault with deadly weapon and with object. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with an object, device, or instrument did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault and malice murder.

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Trial court erred when the court failed to merge the defendant's aggravated assault conviction into the defendant's conviction for felony murder because there was no evidence of a deliberate interval separating the infliction of any non-fatal wounds and any fatal wounds; instead, the undisputed evidence was that the wounds were delivered in quick succession. Sears v. State, 292 Ga. 64, 734 S.E.2d 345 (2012).

Aggravated assault and armed robbery.

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. Hall v. State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Because the victim was still being pistol whipped while the men asked the victim what the victim had and took the victim's wallet and cell phone, the robbery by use

Included Crimes (Cont'd)
2. Crimes Against the Person (Cont'd)

of a handgun was completed at the same place and approximately the same time as the aggravated assault with a handgun; thus, the timing of the offenses of armed robbery and aggravated assault with intent to rob did not preclude their merger. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Because the "assault" element of aggravated assault with intent to rob is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element, there is no element of aggravated assault with intent to rob that is not contained in armed robbery, and the offenses merge. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Aggravated assault and aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand, and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Simple assault did not merge with battery. — Trial court did not err in failing to merge the defendant's convictions for simple assault and battery because the convictions were based upon different conduct as the first cut to the victim's forehead caused reasonable apprehension of immediate violent injury supporting the simple assault conviction, and the victim's remaining injuries caused by the knife wounds that followed supported a finding of visible bodily harm to support the battery conviction and each crime required proof of a fact that the other did not. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Child molestation and aggravated sexual battery. — Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. Gaston v. State, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires un-

der O.C.G.A. § 16-6-4(a). Chandler v. State, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Burglary and felony murder with burglary as predicate felony. — While the evidence was sufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of felony murder, with burglary as the predicate felony, armed robbery, burglary, possession of a firearm during the commission of a crime, and misdemeanor possession of marijuana, the defendant's conviction for burglary could not stand because the burglary conviction served as the predicate felony for the felony murder conviction; thus, it was error to sentence the defendant for both felony murder and burglary. Young v. State, 291 Ga. 627, 732 S.E.2d 269 (2012).

Malice murder and felony murder. — Trial court erred by sentencing defendant to concurrent sentences of life imprisonment for malice murder and felony murder because there was only a single victim; thus, the defendant could not be convicted and sentenced for both murder counts. Gamble v. State, 291 Ga. 581, 731 S.E.2d 758 (2012).

3. Crimes Against Property

Three vehicle collisions arising out of erratic driving arose from the same conduct. — Pursuant to O.C.G.A. § 16-1-7, a defendant could not be prosecuted for DUI and other traffic citations by a city after the defendant had already pled guilty to charges issued by the state patrol arising out of the same course of conduct. Although the defendant struck three different cars, there was no break in the action of the defendant's erratic driving. Dean v. State, 309 Ga. App. 459, 711 S.E.2d 42 (2011).

4. Application to Other Crimes

Drug possession. — Trial court did not err when the court granted the defendant's plea in bar as to the second accusation for possession of Xanax because the state had charged the defendant with the identical crime of possession of an unspecified amount of Xanax on a prior date in two accusations, the second of which was brought after the defendant had pled guilty to the first. State v. Pruiett, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

Trial court erred by granting defendant's plea in bar as to the second accusation's charges for possession of methamphetamine, clonazepam, and marijuana because defendant could not have been convicted of possession of those drugs in a former prosecution, which involved only Xanax. State v. Pruiett, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

Illegal possession of drugs as lesser included offense of illegal sale.

Although the accomplice's conduct in fraudulently representing to the pharmacist that the accomplice had a doctor's authority to call in the prescriptions occurred in a single telephone call, the defendant's conduct of acquiring possession of the several different controlled substances was not the same conduct for the purpose of deciding whether the offenses merged because acquiring possession of the first prescription drug was not the same conduct as acquiring possession of the second prescription drug, and neither were the same as acquiring possession of the third prescription drug; thus, those offenses of obtaining a controlled substance by fraud did not merge for sentencing purposes. Hopkins v. State, 328 Ga. App. 844, 761 S.E.2d 896 (2014).

DUI and criminal trespass separate transactions. — Motion in autrefois convict and plea of former jeopardy was properly denied because the offense of DUI did not arise from the same transaction as the criminal trespass; the defendant was arrested on a warrant for criminal trespass at the residence of a live-in girlfriend, while the defendant was arrested for DUI near, but not at, the residence. Thus, the incidents were separate transactions. Johns v. State, 319 Ga. App. 718, 738 S.E.2d 304 (2013).

Joint Prosecution of Offenses

1. In General

Same conduct and same jurisdiction not shown. — Defendant's conviction for driving under the influence (DUI) less safe was affirmed because the defendant's actions in the Fulton County hit

Joint Prosecution of Offenses (Cont'd)
1. In General (Cont'd)

and run incident and the defendant's actions in the Gwinnett County DUI less-safe incident were neither the same transaction nor the same conduct as contemplated by O.C.G.A. § 16-1-7(a). Hassard v. State, 319 Ga. App. 708, 738 S.E.2d 293 (2013).

Prosecutor's knowledge of offenses. State was prohibited by O.C.G.A. § 16-1-7(b) from adding new charges to the indictment because the charges in the previous two-count indictment were for different offenses than the ones the state added to the re-indictment, and all of the crimes were actually known to the prosecutor when the defendant commenced the first prosecution. Herrington v. State, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

Defendant's procedural double jeopardy motion was properly denied because the disposition form was legally insufficient to show that the solicitor handling the defendant's guilty plea in state court actually knew that there were felony offenses arising out of the same conduct as the misdemeanor traffic offense as the disposition form simply listed the felony offenses and the date the defendant was initially detained; thus, the state could proceed with the state's prosecution of the defendant in superior court on the felony charges of trafficking in cocaine, possession of cocaine with intent to distribute, abandonment of drugs in a public place, and bribery. Sellers v. State, 770 S.E.2d 31, No. A14A2197, 2015 Ga. App. LEXIS 205 (2015).

2. Crimes Against the Person

Attempt to commit child molestation and enticing a child for indecent purposes. — Trial court did not err in failing to merge the defendant's convictions for criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes because to convict the defendant of criminal attempt to commit child molestation, the state had to prove that the defendant took a substantial step towards doing an immoral or indecent act to or with someone believed to be under the age of 16, and for purposes of convicting the defendant of criminal attempt to entice a child for indecent purposes, the state was not required to prove that the defendant was acting with an intent or desire to satisfy sexual desires. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Aggravated assault and murder. — Trial court erred by convicting the defendant of aggravated assault and an associated weapons possession conviction in addition to murder because, with regard to the stabbing death of the victim, there was no evidence of any interval, deliberate or otherwise, separating the infliction of the victim's non-fatal wounds from the infliction of the wounds that killed the victim. Reddings v. State, 292 Ga. 364, 738 S.E.2d 49 (2013).

Felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. Sapp v. State, 290 Ga. 247, 719 S.E.2d 434 (2011).

Merger cannot be deemed waived for concealing death. — Appellant's merger claims cannot simply be deemed waived on appeal following the entry of a guilty plea, even if the appellant fails to raise the issue, and four of the appellant's five convictions for concealing the death of the appellant's girlfriend merged since only one violation occurred. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

3. Crimes Against Property

Robbery by intimidation and theft by taking. — Defendant's convictions for robbery by intimidation and theft by taking did not violate the defendant's double jeopardy rights because the defendant obtained the money by intimidation when the defendant threatened to stab the victim, whereas the defendant obtained the

victim's car without the use of intimidation. Southwell v. State, 320 Ga. App. 763, 740 S.E.2d 725 (2013).

4. Application to Other Crimes

Unauthorized offers to sell. — Because defendant's argument on appeal was a challenge to defendant's convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, the defendant did not properly challenge the convictions; defendant's only recourse was through habeas corpus proceedings. Rogers v. State, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

Drug related offenses. — Trial court did not err in failing to merge the counts for attempt to manufacture methamphetamine and possession of ephedrine and pseudoephedrine because the jury could have found different conduct to support each offense; the jury could have found that the defendant assembled methamphetamine ingredients with intent to manufacture and that the defendant possessed some part of those ingredients after altering the ingredients. Taylor v. State, 320 Ga. App. 596, 740 S.E.2d 327 (2013).

Severance

3. Sentencing

Separate sentences for drug trafficking offenses. — Trial court did not err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant's vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. Ahmad v. State, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Only one sentence when only one victim. — Trial court erred in sentencing the defendant to separate terms of life imprisonment for malice murder and felony murder since there was only one victim. Ward v. State, 292 Ga. 637, 740 S.E.2d 112 (2013).

Although the prescriptions that the defendant picked up on one occasion were purportedly for two different patients, the defendant's single act of going to the pharmacy to pick up the prescriptions on that date was the same conduct for the purpose of deciding whether the offenses merged; thus, Counts 1 and 2 of obtaining a controlled substance by fraud merged, and the trial court erred in imposing separate sentences as to those counts. Hopkins v. State, 328 Ga. App. 844, 761 S.E.2d 896 (2014).

16-1-8. When prosecution barred by former prosecution.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Gibson v. State, 319 Ga. App. 627, 737 S.E.2d 728 (2013); State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Offenses Arising from Same Conduct

Drug possession. — Trial court did not err when it granted defendant's plea in bar as to the second accusation for possession of Xanax because the State had

Offenses Arising from Same Conduct (Cont'd)

charged defendant with the identical crime of possession of an unspecified amount of Xanax on a prior date in two accusations, the second of which was brought after the defendant had pled guilty to the first. State v. Pruiett, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

Trial court erred by granting defendant's plea in bar as to the second accusation's charges for possession of methamphetamine, clonazepam, and marijuana because defendant could not have been convicted of possession of those drugs in a former prosecution, which involved only Xanax. State v. Pruiett, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

Dual federal and state prosecutions not barred.

Trial court did not err in denying the defendant's motion in autrefois convict/plea in bar because the federal and state prosecutions required proof of a fact that the other did not as the defendant's federal conviction for conspiracy to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance required the agreement of two or more persons to commit a criminal act, and the state trafficking charge did not require proof of an agreement between two or more people to commit a criminal act, and required proof of the possession of the cocaine. Stembridge v. State, 331 Ga. App. 199, 770 S.E.2d 285 (2015).

Felony prosecution not barred by prior plea of guilty to traffic offense.

Defendant's procedural double jeopardy motion was properly denied because the disposition form was legally insufficient to show that the solicitor handling the defendant's guilty plea in state court actually knew that there were felony offenses arising out of the same conduct as the misdemeanor traffic offense as the disposition form simply listed the felony offenses and the date the defendant was initially detained; thus, the state could proceed with the state's prosecution of the defendant in superior court on the felony charges of trafficking in cocaine, possession of cocaine with intent to distribute, abandonment of drugs in a public place, and bribery. Sellers v. State, 770 S.E.2d 31, No. A14A2197, 2015 Ga. App. LEXIS 205 (2015).

Retrial

No double jeopardy.

Trial court erred in granting the defendant's plea in bar because double jeopardy did not bar a second trial on the same charges since the retrial was granted due to an erroneous evidentiary ruling; the order granting a new trial did not find the evidence was legally insufficient to sustain the verdict, but instead, the second trial judge granted the new trial based on the original trial court's error in admitting an exhibit to prove that defendant had a prior felony conviction after the defendant had offered to stipulate that the defendant was a convicted felon. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

Since the reversal of a defendant's convictions amounted to neither an adjudication of not guilty nor a finding that the evidence did not authorize the verdict, the defendant's re-indictment and retrial were not barred. Dryden v. State, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

Trial court did not err by declaring a mistrial after the first trial and retrying the defendant because the defendant did not show that the defendant raised the doctrine of procedural double jeopardy prior to the second trial. Riddick v. State, 320 Ga. App. 500, 740 S.E.2d 244 (2013).

Since the record established that the order authorizing the withdrawal of the defendant's guilty pleas was vacated on the defendant's own motion, thereby reinstating the defendant's original guilty pleas and convictions, there was not in this case a second prosecution and the trial court did not err by denying the defendant's motion for plea in bar. Pierce v. State, 294 Ga. 842, 755 S.E.2d 732 (2014).

Effect of reversal for error at trial.

Double jeopardy protection did not bar a second trial on the same charges because the defendant's motion for new trial was granted due to an erroneous evidentiary ruling. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

When the actions of a prosecutor cause a mistrial, etc.

Trial court did not err in denying the defendant's plea of former jeopardy because its finding that the prosecution's question on cross-examination was an unintentional reference to the defendant's right to remain silent was not clearly erroneous; the record contained evidence to support the trial court's finding that the prosecutor's question was not intended to goad the defense into seeking a mistrial. Demory v. State, 313 Ga. App. 265, 721 S.E.2d 93 (2011).

Application Generally

State permitted to prove case against defendant. — Because the defendant's brother was prosecuted in federal court for possession of a cocaine mixture in an apartment, the state was permitted to prove the state's case against the defendant by proof of joint constructive possession; the state did not prosecute the brother for the brother's joint constructive possession of the cocaine mixture in the apartment, but the United States did prosecute the brother in federal court. Holiman v. State, 313 Ga. App. 76, 720 S.E.2d 363 (2011).

16-1-12. Restrictions on contingency fee compensation of attorney appointed to represent state in forfeiture action.

(a) In any forfeiture action brought pursuant to this title, an attorney appointed by the Attorney General or district attorney as a special assistant attorney general, special assistant district attorney, or other attorney appointed to represent this state in such forfeiture action shall not be compensated on a contingent basis by a percentage of assets which arise or are realized from such forfeiture action. Such attorneys shall also not be compensated on a contingent basis by an hourly, fixed fee, or other arrangement which is contingent on a successful prosecution of such forfeiture action.

(b) Nothing in this Code section shall be construed as prohibiting or otherwise restricting the Attorney General or a district attorney from appointing special assistants or other attorneys to assist in the prosecution of any action brought pursuant to this title. (Code 1981, § 16-1-12, enacted by Ga. L. 2012, p. 1035, § 2/SB 181.)

Effective date. — This Code section became effective July 1, 2012.

Editor's notes. — Ga. L. 2012, p. 1035, § 3/SB 181, approved by the Governor May 2, 2012, provided that the effective date of this Code section is July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date provisions that precede the date of approval by the Governor.

CHAPTER 2

CRIMINAL LIABILITY

ARTICLE 1

CULPABILITY

16-2-1. "Crime" defined.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in State v. Ogilvie, 292 Ga. 6, 734 S.E.2d 50 (2012).

Criminal Negligence

Denial of necessary and appropriate medical care for child. — Sufficient evidence supported defendant's cruelty to children convictions based on being criminally negligent in failing to seek medical care for a defendant's child after the child was bitten by a dog and a human and suffered excessive vomiting, and the defendant knew for several days but did not seek medical attention for the child. Morast v. State, 323 Ga. App. 808, 748 S.E.2d 287 (2013).

Charge on criminal negligence warranted.

Court erred by denying the defendant's petition for habeas relief from an aggravated assault conviction because appellate counsel's failure to raise the issue that the trial court erred by failing to charge the jury on negligence was not subjectively a strategic decision but was based upon counsel's lack of familiarity with the relevant law and was deficient. Sullivan v. Kemp, 293 Ga. 770, 749 S.E.2d 721 (2013).

Defendant acted with requisite criminal negligence. — Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), because the evidence authorized a finding that the defendant acted with the requisite criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim's body; the state's expert testified that the victim's burns were inconsistent with the defendant's claim that the incident leading to the victim's injuries was merely accidental. Wells v. State, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Criminal negligence not found in 45 minute phone call. — Evidence was insufficient to convict the defendant because the state did not show that the defendant's conduct while the two children were under the defendant's supervision constituted criminal negligence supporting the defendant's convictions for second degree cruelty to children and for reckless conduct related to the drowning deaths of the two children as it could not be said that taking a 45-minute phone call in itself constituted a failure to reasonably supervise the children; the defendant confirmed that the children were in an upstairs room playing when the defendant initiated the phone call; and the defendant had told the children they could not go swimming and there was no showing that the children had a propensity to disobey the defendant. Corvi v. State, 296 Ga. 557, 769 S.E.2d 388 (2015).

16-2-2. Effect of misfortune or accident on guilt.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Charge not required where participation in crime denied.

Trial court did not err in refusing to give the defendant's requested charge on accident under O.C.G.A. § 16-2-2 because the defendant repeatedly denied striking any vehicle in a parking lot. Sevostiyanova v. State, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Trial court did not err by refusing to give the defendant's requested charge on the sole defense of accident because the defendant testified at trial and denied driving recklessly or with any disregard for the safety of other persons or property and the defense is only available when the defendant admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Lauderback v. State, 320 Ga. App. 649, 740 S.E.2d 377 (2013).

Evidence insufficient to establish accident.

Evidence was sufficient to reject the defendant's accident defense and to convict the defendant of malice murder and other crimes in connection with the shooting death of the victim because the defendant's 21-year-old neighbor gave the 15-year-old defendant a loaded .38-caliber revolver; when the victim met the defendant the next afternoon, the defendant led the victim to where the defendant was keeping the gun and shot the victim; and, although the defendant's firearms expert testified that an accidental discharge was much more likely if the gun was cocked before being fired, the expert conceded on cross-examination that if somebody pulled the hammer back, that person was about to shoot. Kosturi v. State, 296 Ga. 512, 769 S.E.2d 294 (2015).

Failure to charge the jury on the affirmative defense of accident, etc.

In a vehicular homicide case, any error in the trial court's failure to charge the jury on the law of accident under O.C.G.A. § 16-2-2 was waived because the proposed charge was not in the record, and there was no evidence that it was the pattern charge, and the defendant failed to object after the charge was given as required by O.C.G.A. § 17-8-58(a). Rouen v. State, 312 Ga. App. 8, 717 S.E.2d 519 (2011).

Instruction on accident. — Appellate court erred in reversing defendant's conviction for vehicular homicide based on her failure to stop for a pedestrian in a crosswalk because those charges were strict liability offenses to which the accident defense did not apply since it was undisputed she voluntarily drove into the crosswalk and struck the child. State v. Ogilvie, 292 Ga. 6, 734 S.E.2d 50 (2012).

Cited in Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011); Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Culpable Neglect or Unlawful Act

Charge on accident not authorized when act was criminally negligent.

Defendant admitted that the defendant pulled back the hammer of the gun and pointed the gun at the victim to scare the victim, but did not intend for the gun to go off; this testimony established criminal negligence, and the defendant was not entitled to an instruction on accident and misfortune under O.C.G.A. § 16-2-2. Browner v. State, 296 Ga. 138, 765 S.E.2d 348 (2014).

Theory of accident not supported.

No reasonable probability existed that the outcome of the defendant's murder trial would have been different even had trial counsel presented an expert's testimony as to the defendant's borderline intellectual functioning and organic brain damage in the guilt/innocence phase of the original trial because the defendant's

Culpable Neglect or Unlawful Act (Cont'd)

own testimony acknowledged that the defendant shot the vehicle occupant purposefully, as opposed to accidentally, in attempting to obtain a vehicle to escape, and even if the defendant had been convicted of only malice murder, instead of felony murder, the defendant would have still remained eligible for the death penalty. Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013).

Evidence did not raise issue of accident or misfortune.

Trial court did not err in refusing an instruction on the affirmative defense of accident because the defendant admitted going to the service station with the intent to rob the victim, admitted pointing a loaded gun at the victim, and acted with criminal negligence, rendering the defense of accident inadmissible. Brockman v. State, 292 Ga. 707, 739 S.E.2d 332 (2013).

Instruction properly refused.

Defendant was not entitled to a jury charge on accident since the accident occurred as the defendant was driving recklessly. Dryden v. State, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

16-2-3. Presumption of sound mind and discretion.

JUDICIAL DECISIONS

Directed verdict in competency trial. — Trial court did not err in denying the defendant's motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant's competency trial because the evidence on competency was in conflict; even though the defendant's expert witness opined that the defendant was not competent to stand trial, the state's expert testified that the defendant was competent to do so. Smith v. State, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Competency established. — While the defendant presented expert testimony, based on the defendant's performance on various cognitive tests, that the defendant was not competent to stand trial, the finding of competency to stand trial was supported by the testimony of the state's expert, who opined that the defendant understood the nature and object of the proceedings, had a basic comprehension of the defendant's own condition in reference to the proceedings, and had the ability to assist counsel in a defense. Tiegreen v. State, 314 Ga. App. 860, 726 S.E.2d 468 (2012).

16-2-4. Presumption that acts of sound person willful.

RESEARCH REFERENCES

ALR. — Challenges to pre- and post-conviction forfeitures and to post-conviction restitution under animal cruelty statutes, 70 ALR6th 329.

16-2-6. Intention a question of fact.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Sufficiency of evidence.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Cited in Hickman v. State, 311 Ga. App. 544, 716 S.E.2d 597 (2011); Fairwell v. State, 311 Ga. App. 834, 717 S.E.2d 332 (2011); Freeman v. State, 329 Ga. App. 429, 765 S.E.2d 631 (2014); Freeman v. State, 329 Ga. App. 429, 765 S.E.2d 631 (2014).

Application

Intent to arouse or satisfy sexual desires.

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires, pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012).

Intent to assist in possession and sale of marijuana. — There was sufficient evidence of knowledge and intent to assist with or participate in the crime of possession of marijuana with intent to distribute when a defendant drove the defendant's roommate to a location in another county and the roommate brought along a sealed, insulated bag, which the defendant placed in the back compartment of the car. Able v. State, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

Intent to make terroristic threats. — Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Sufficient intent to kidnap. — Jury was authorized to find that the defendant had the requisite criminal intent from the fact that the defendant approached the victim who the defendant did not know and offered the victim money. Upon approaching the victim, the defendant grabbed the victim, lifted the victim up, and carried the victim away against the victim's will. Thomas v. State, 320 Ga. App. 101, 739 S.E.2d 417 (2013).

ARTICLE 2

PARTIES TO CRIMES

16-2-20. When a person is a party to a crime.

Law reviews. — For article, "State v. Jackson and the Explosion of Liability for Felony Murder," see 62 Mercer L. Rev. 1335 (2011).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Participants need not be actual perpetrators.

When the defendant, an attorney, knew that the client had received approximately $15,000 at closing, but told the client's insurer that the client had not been paid for the sale of the property because the indictment specifically charged the defendant with violating the insurance fraud statute; and the indictment further indicated, tracking the statute's own language, that the fraudulent misrepresentation was the statement of the client that the client had suffered a loss of $117,849.82, the indictment was sufficient to withstand a general demurrer. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

Presence and assistance in commission of crime.

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). Brown v. State, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Sufficiency of indictments.

When the defendant, an attorney, knew that the client had received approximately $15,000 at closing, but told the client's insurer that the client had not been paid for the sale of the property, the indictment was sufficient to withstand a special demurrer because the indictment specifically identified the fraudulent statement as the client's December 8, 2008 proof of loss statement; the indictment apprised the defendant of the charges against the defendant so that the defendant could prepare a defense; and the indictment protected the defendant against subsequent prosecutions for the same offense. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

Cited in Bryson v. State, 316 Ga. App. 512, 729 S.E.2d 631 (2012); Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012); Williams v. State, 291 Ga. 501, 732 S.E.2d 47 (2012); Simmons v. State, 292 Ga. 265, 736 S.E.2d 402 (2013); Jackson v. State, 322 Ga. App. 196, 744 S.E.2d 380 (2013); Kirchner v. State, 322 Ga. App. 275, 744 S.E.2d 802 (2013); Hassel v. State, 294 Ga. 834, 755 S.E.2d 134 (2014); Chambers v. State, 327 Ga. App. 663, 760 S.E.2d 664 (2014).

Conspiracy

Where conspiracy is shown, etc.

Evidence was sufficient to support codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on her admission that she provided the identifying information of several current and former tenants of the apartment complex she worked at to a third party and, even though she did not know the identity of the other persons involved in the scheme nor the details of the operation, she was concerned in the commission of the crime and intentionally aided or abetted in the commission of the crime by providing the information. Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Aiding and Abetting

Evidence sufficient as to aiding and abetting armed robbery.

Defendant's conviction of attempt to commit armed robbery was affirmed because the defendant discussed the attempted armed robbery beforehand with the codefendants, provided part of the disguise for the defendant's sibling, drove the codefendants to the crime scene, was present near the scene of the attempted robbery, and fled the scene after the attempted robbery. Skipper v. State, 314 Ga. App. 870, 726 S.E.2d 127 (2012).

While there was no evidence that the defendant fired any of the weapons used in the shooting, there was evidence that the defendant supplied one of the weapons with the knowledge that the weapon was to be used to commit armed robbery, was present during the commission of the crimes, fled the scene, and accompanied several of the accomplices to dispose of two of the weapons used in the crimes; thus, there was ample evidence to inculpate the defendant as a party to the crimes. Oliphant v. State, 295 Ga. 597, 759 S.E.2d 821 (2014).

Evidence that defendant was get-away driver was sufficient for conviction. — In a case involving the malice murder of the deceased victim, the aggravated assaults of the deceased victim and four other victims, the false imprisonment and armed robbery of another victim, and possession of a firearm during the commission of a crime, the evidence was sufficient to convict the defendant as a party because the eyewitness stated that the driver of the car, the defendant, shouted to the first accomplice before the accomplice shot the deceased victim, then gestured to the first and second accomplice to get into the car, which the defendant then drove away; and the defendant acted as the driver of the getaway vehicle after both the shooting of the deceased victim and the robbery of another victim. Wright v. State, 296 Ga. 276, 766 S.E.2d 439 (2014).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) and of child molestation. Evidence was presented that the defendant had prior knowledge of the intended crimes, shared in the intent of the spouse to entice the minor victim to the defendants' home, and was present for the crimes of child molestation. Dockery v. State, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which the defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the au-

Aiding and Abetting (Cont'd)

thorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. Sipplen v. State, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Sufficient circumstantial evidence supported the defendant's armed robbery conviction because the evidence showed the defendant actively aided and abetted the defendant's codefendant by: (1) driving the codefendant to a crime scene; (2) waiting during the crimes with an intent to use the defendant's car as a getaway car; (3) fleeing the scene with the codefendant; (4) waiting while the codefendant broke into a house; (5) fleeing the house with the codefendant; and (6) having a gunshot wound. Jones v. State, 315 Ga. App. 427, 727 S.E.2d 216 (2012).

Planning robbery and driving getaway car, etc.

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Jury instructions.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Application

1. In General

Possession of firearm during commission of crime.

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. Morrell v. State, 313 Ga. App. 443, 721 S.E.2d 643 (2011), cert. denied, No. S12C0800, 2012 Ga. LEXIS 484 (Ga. 2012).

Evidence sufficient to support finding of participation.

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (4) the people drove

away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the shooter by telling the shooter "you better not let these guys get away, go ahead and handle your business, do what you got to do," and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. Talifero v. State, 319 Ga. App. 65, 734 S.E.2d 61 (2012).

Jury instruction properly given. — Trial court properly instructed jury on the issue of conviction as a party to a crime, as evidence showed defendants acted jointly to rob and kidnap the victim and fled together after the shooting. The fact that first defendant did not actually fire the gun did not affect his convictions. Flournoy v. State, 294 Ga. 741, 755 S.E.2d 777 (2014).

When the defendant was convicted of murder, armed robbery, and related crimes in connection with the death of the victim, the defendant's counsel was not ineffective for failing to object to the trial court's jury instruction on parties to a crime, insofar as the indictment did not specifically charge the defendant as a party, because it was well-settled that the indictment need not specifically charge a criminal defendant as a party to the crime in order to permit a jury instruction on accomplice liability and authorize a conviction based thereon. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461 (2015).

2. Child Abuse and Neglect

Child cruelty.

Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. Tabb v. State, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

3. Drug Related Offenses

Trafficking in cocaine.

Trial court did not err in convicting the defendant of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) because the jury was authorized to find that the defendant was in joint constructive possession of the cocaine and was a party to the crime pursuant to O.C.G.A. § 16-2-20(a) and (b)(3); the evidence showed that the defendant participated and intentionally aided in the commission of the drug trafficking offense by driving the codefendants and the cocaine to the pre-arranged location for the transaction, warning the codefendants that the principal agent was a police officer and taking possession of the funds used for the transaction. Valdez v. State, 310 Ga. App. 274, 712 S.E.2d 656 (2011).

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. §§ 16-2-20(b)(3) and former 24-4-8 (see now O.C.G.A. § 24-14-8) since the defendant and the codefendant had both made

Application (Cont'd)
3. Drug Related Offenses (Cont'd)

statements regarding the defendant's involvement in the criminal activity, and the police observed the defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. Martinez v. State, 314 Ga. App. 551, 724 S.E.2d 851 (2012).

Evidence was sufficient to support the defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), based on the defendant's participation in a sale of a sufficient amount and purity of cocaine to an undercover agent; although a codefendant conducted the sale directly, the defendant was a party to the sale under O.C.G.A. § 16-2-20(b)(3) since the defendant was in a nearby vehicle that the codefendant went to during the transaction. McGee v. State, 316 Ga. App. 661, 730 S.E.2d 131 (2012).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) because the state presented evidence that even if the defendant did not bring the bag of cocaine to an owner's residence, the defendant possessed the cocaine and was a party to the crime of trafficking in cocaine under O.C.G.A. § 16-2-20. Kegler v. State, 317 Ga. App. 427, 731 S.E.2d 111 (2012).

Delivery and distribution of marijuana.

Evidence that a defendant participated in a plan for the delivery of a package containing 12 pounds of marijuana to a residence, along with digital scales, a marijuana grinder, and plastic baggies at the residence, and the defendant's admission that the marijuana was the defendant's, was sufficient to convict the defendant as a party to possession of marijuana with intent to distribute, trafficking in marijuana, and possession of marijuana, pursuant to O.C.G.A. § 16-2-20. Salinas v. State, 313 Ga. App. 720, 722 S.E.2d 432 (2012).

Evidence sufficient to show defendant was party to sale of controlled substance. — Combined evidence established that the defendant actively participated in and was a party to the three separate sales of a controlled substance based on the defendant freely and voluntarily admitting that during the last controlled drug buy, the defendant supplied an informant with 500-600 pills, the pills tested positive for trifluoromethylphenyl piperazine, and that the defendant acted the same during all of the controlled purchases. Walker v. State, 323 Ga. App. 685, 747 S.E.2d 691 (2013).

Witness was not accomplice in drug transaction. — Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's accomplice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. Williams v. State, 289 Ga. 672, 715 S.E.2d 76 (2011).

Jury instructions misstated law of party to a crime for marijuana possession. — Trial court's instructions on "mere association" and "mere presence" with regard to charging a defendant as a party to a crime under O.C.G.A. § 16-2-20(a) were misstatements of the law and also directly conflicted with other closely related instructions, and were harmful error requiring reversal of the defendant's convictions for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1). Able v. State, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

4. Murder or Manslaughter

Party to malice murder.

While it was not possible to determine whether the fatal shot was fired from the defendant's pistol or the codefendant's pistol, the evidence was sufficient to support the conviction for malice murder because the jury was properly instructed on the law of parties to a crime, under which, even if the fatal shot was in fact fired by the codefendant, the defendant could be held liable. Coe v. State, 293 Ga. 233, 748 S.E.2d 824 (2013).

Evidence presented at trial was sufficient to authorize a rational jury to find appellant guilty beyond a reasonable doubt of the crimes of felony murder, malice murder, and possession of a firearm during the commission of a crime based on the testimony of a codefendant, who detailed how the appellant wanted money and robbed and shot an individual with the codefendants to obtain money. Ryans v. State, 293 Ga. 238, 744 S.E.2d 759 (2013).

Evidence was sufficient to convict the defendant of malice murder, possession of a firearm during the commission of a felony, and all of the other crimes of which the defendant was convicted because the defendant was a party to the crimes as the defendant was not merely present at the scene when the victim was murdered with a pistol; and, even crediting the defendant's own version of events, the defendant agreed with an accomplice to rob the victim, and when the accomplice struck the victim with a pistol, the defendant helped silence the victim and arrange the departure from the scene, even though the defendant heard the accomplice fire a gunshot. Dixon v. State, 294 Ga. 40, 751 S.E.2d 69 (2013).

Defendant's convictions for malice murder and possession of a firearm by a convicted felony were supported by sufficient evidence since the evidence permitted an inference that the defendant was present when the victim was shot, fled the murder scene with an accomplice, and subsequently lied about key facts when questioned by police. Rush v. State, 294 Ga. 388, 754 S.E.2d 63 (2014).

Evidence was sufficient to enable a rational trier of fact to find defendant guilty of malice murder as a party to the crime and all of the crimes of which defendant was convicted beyond a reasonable doubt based on the evidence showing that defendant directed a drug selling partner to shoot another person and the pair went together and found the victim and the partner shot the victim to death. Folston v. State, 294 Ga. 778, 755 S.E.2d 803 (2014).

Party to murder.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011).

Trial court erred in granting the defendant's motion for new trial as the evidence was sufficient to find the defendant intentionally helped in the commission of the murder and related crimes and was a party to the offenses because the defendant brought the gun used to kill the victim; the defendant stood over the victim after the accomplice shot the victim at close range and made a statement indicating the defendant's approval of the shooting; and the defendant fled from the scene with the accomplice, leaving the victim for dead. State v. Jackson, 294 Ga. 9, 748 S.E.2d 902 (2013).

Fact that the defendant was merely the driver and did not actually fire the gun did not undermine the legal sufficiency of the evidence since it showed that the defendant threatened the victim before the shooting, drove to the victim's apartment complex, approached the victim during the altercation with the co-defendant, and drove the co-defendant away; thus, one reasonably might infer that both men shared a criminal intent and there was sufficient evidence to find the defendant was a party to the crimes. Bryant v. State, 296 Ga. 456, 769 S.E.2d 57 (2015).

Evidence of co-perpetrator's acquittal not admissible. — Murder defendant was not entitled to a retrial at which evidence of the defendant's co-perpetrator's separate acquittal of the murder could be introduced; the defendant was not charged with aiding or abetting the acquitted co-perpetrator, but with the murder, and the state could make the state's case that the defendant was a party to that crime in any way, under

Application (Cont'd)
4. Murder or Manslaughter (Cont'd)

O.C.G.A. § 16-2-20. Davis v. State, 296 Ga. 126, 765 S.E.2d 336 (2014).

Evidence sufficient for participation in murder.

Based on the evidence, a juror could infer from the conduct of the defendant before and at the time of the shooting that the defendant advised, encouraged, and counseled the shooter to fire the fatal shot. The evidence was sufficient to authorize a juror to find beyond a reasonable doubt that the defendant was a party to the crimes of which the defendant was convicted. Brown v. State, 291 Ga. 887, 734 S.E.2d 41 (2012).

Evidence was sufficient to convict the defendant of felony murder and other crimes involving the shooting and killing of the first victim and the shooting and injuring of the second and third victims as a party because the defendant and the shooter entered the second victim's home; the shooter started demanding money from those present; the defendant handed the shooter a revolver; the first victim struggled with the shooter for the gun, but the defendant pushed that victim down and the shooter shot and killed that victim; the shooter shot the second victim in the neck, severely wounding that victim; and the shooter shot the third victim grazing the side of that victim's head. Glover v. State, 296 Ga. 13, 764 S.E.2d 826 (2014).

Jury could reasonably infer from the evidence that the defendant called the defendant's gang members to retrieve the defendant from an apartment where someone was threatening the defendant, as well as the defendant's celebrating with the gang that evening after the shooting, that the defendant was a party to the crime under O.C.G.A. § 16-2-20(b)(4) by advising, encouraging, counseling, or procuring others to commit the crime. Slaton v. State, 296 Ga. 122, 765 S.E.2d 332 (2014).

Evidence sufficient to sustain conviction for felony-murder.

Defendants' convictions were supported by sufficient evidence because the jury was properly instructed on the law regarding parties to a crime and the eyewitness testimony and other evidence presented at trial was sufficient to authorize a rational jury to find both defendants guilty. Bighams v. State, 296 Ga. 267, 765 S.E.2d 917 (2014).

Evidence sufficient to sustain verdict of malice murder.

Evidence was sufficient to convict the defendant of malice murder because the co-defendant was in the driver's seat of the vehicle and the defendant was in the passenger's seat; shots were fired from inside the car through the lowered passenger window; a witness saw the defendant holding a handgun out of the passenger window; the driver's side window was closed; the victim was fatally shot; the bullet removed from the victim was consistent with the .25 caliber shell casings found in the vehicle; and, even if the jury concluded that the co-defendant fired the handgun, there was ample evidence that the defendant was concerned in the commission of the murder and, thus, the defendant was legally culpable for the murder. Williams v. State, 296 Ga. 573, 769 S.E.2d 318 (2015).

Evidence sufficient for felony murder, attempted armed robbery, and possession of firearm convictions. — Evidence was sufficient to convict the defendant as a party to felony murder, attempted armed robbery, and two counts of possession of a firearm during the commission of a crime because the defendant told the officer that the defendant and the co-indictee had planned to rob a cab driver; the defendant admitted to calling the cab company, dropping the co-indictee off at the location to which the cab had been summoned, and picking the co-indictee up at a nearby park after the robbery attempt; the defendant admitted knowing that the co-indictee was armed with a nine-millimeter gun; and shell casings recovered from the victim's cab were later determined by a firearms expert to have been fired from a gun found in the co-indictee's home. Drake v. State, 296 Ga. 286, 766 S.E.2d 447 (2014).

5. Other Crimes Against the Person

Aggravated assault.

Evidence was sufficient for a rational trier of fact to find that the defendant was

a party to the crime of aggravated assault under the doctrine of transferred intent as, even though another individual shot the victim, the defendant participated in the gun fight that wounded the unintended victim. Jones v. State, 292 Ga. 656, 740 S.E.2d 590 (2013).

Evidence was sufficient to convict the defendant as a party to the crime of the aggravated assaults of the two victims because the jury could have concluded that the defendant accompanied the others to a house with the intent to invade a rival gang's neighborhood and that the defendant brought a gun in a black bag for that purpose; the co-defendants and other witnesses testified that the defendant had a gun at the time of the shooting, supporting an inference that the defendant displayed the gun, even if the defendant did not shoot the gun; and, after the shooting, the defendant came into the house, wiping off a gun. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Evidence sufficient for participation in aggravated assault.

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was sufficient for the jury to infer that the defendant was an armed participant in the crimes. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Evidence was sufficient to convict the defendant of aggravated assault and a violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., because various gang members including the defendant's brother and their associate were on the dance floor flashing gang hand signs and dancing roughly, purposefully bumping into other club patrons, and an altercation ensued; the defendant's brother struck the victim in the back of the victim's head with a beer bottle; the defendant's associate and several others struck the victim and punched the victim in the head; when the victim walked toward the exit door, the defendant hit the victim across the face with a bottle; and the victim was taken by ambulance to a hospital. Dowdell v. State, 325 Ga. App. 593, 754 S.E.2d 383 (2014).

Evidence sufficient as party to armed robbery. — Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defendant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest. Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

Sufficient evidence supported defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed defendant to be charged with and convicted of the same offenses as co-defendant since the evidence showed that defendant drove co-defendant to the fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

There was sufficient evidence to support the defendant's conviction for armed robbery as a party to a crime given evidence that the defendant drove the vehicle with three other occupants to the site of the robbery, that there were four black masks for the four men, that the defendant hid a shotgun and showed police where to find the shotgun, and that the defendant was found one street over from the robbery site and was the only person in the area. Clemente v. State, 331 Ga. App. 84, 769 S.E.2d 790 (2015).

Evidence was sufficient to convict the defendant of the four armed robberies as a party as the accomplice testified that the robberies were executed pursuant to a plan orchestrated and aided by the defendant; the accomplice never pointed the weapon at the defendant, nor demanded the defendant's property; and, although the defendant had successfully fled the property, the defendant circled back to the

Application (Cont'd)
5. Other Crimes Against the Person (Cont'd)

residence — while the accomplice was still there — and attempted to steal electronic equipment. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

6. Property Offenses

Evidence sufficient to convict for hijacking.

Evidence was sufficient to convict the defendant of insurance fraud as the defendant, an attorney, aided the client in making a false or fraudulent written statement for the purpose of procuring or attempting to procure the payment of a false claim because, even though the defendant knew that the client's loan on the property had been paid off on August 4, 2006, at the closing, the defendant nonetheless filed the client's signed proof of loss statement with the client's insurer on December 8, 2008, in which the client falsely claimed a loss of approximately $118,000 under the insurance policy. Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

Evidence sufficient for conviction of shoplifting.

Evidence was sufficient to support the appellant's conviction as a party to the crime of violating O.C.G.A. § 40-6-395(a) for fleeing and eluding because the appellant testified and admitted shoplifting, admitted to having a prior record of shoplifting, had only recently been released from prison, and that getting caught on the day of the events would be a parole violation that would send the appellant back to prison. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751 (2015).

Evidence sufficient to support robbery conviction.

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Party to armed robbery.

Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by selecting the stores to rob, supplying the gun, acting as the getaway driver, and receiving part of the stolen money; law enforcement officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. Williams v. State, 314 Ga. App. 840, 726 S.E.2d 66 (2012).

Evidence sufficient for participation in burglary.

Evidence that the defendant had driven the defendant's son to a home that was burglarized, was waiting by the side of the road for the defendant's son to return, and received numerous calls from the defendant's son while an officer stopped to talk to the defendant, was sufficient to convict the defendant for being a party to the crime of burglary under O.C.G.A. §§ 16-2-20 and 16-7-1(b). Wise v. State, 325 Ga. App. 377, 752 S.E.2d 628 (2013).

Evidence sufficient to sustain conviction for burglary.

Evidence was sufficient to convict the defendant of burglary as a party because, pursuant to a plan the defendant designed, the defendant gained entry into the residence, then assisted the accomplice's unauthorized entry by returning to the door, peering outside where the accomplice was staged with a gun and mask, then leaving that door ajar for the accomplice's unauthorized entry, and, seconds later, the accomplice abruptly entered through that door, taking money and property from the other individuals pres-

ent by use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Evidence sufficient to sustain conviction for attempted burglary.

With regard to the defendant's conviction for attempted burglary, sufficient evidence supported the conviction because the jury evaluated the nature of the circumstances of the morning's events, as well as the daughter's eyewitness testimony identifying the defendant and, although the defendant explained that it was mistakenly the wrong house, the jury was authorized to come to a different and reasonable conclusion based on the state's case. White v. State, 323 Ga. App. 660, 744 S.E.2d 857 (2013).

Party to the crime of entering an automobile with intent to commit theft. — Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. Rinks v. State, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Evidence insufficient to support conviction of theft by taking.

Jury was authorized to find from the evidence that the defendant was guilty beyond a reasonable doubt of theft by taking, O.C.G.A. § 16-8-2, as a party to the crime under O.C.G.A. § 16-2-20 because evidence that another house cleaner could have taken the money would not necessarily have precluded a finding of the defendant's guilt. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

16-2-21. Prosecution of parties who did not directly commit the crime.

JUDICIAL DECISIONS

Jury instruction supported by evidence.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Evidence sufficient to support conviction.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. Tabb v. State, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Evidence that the defendant drove the car and remained there while the defendant's boyfriend took the victim's backpack at gunpoint was sufficient for the jury to find that the defendant aided and

abetted the boyfriend. Teele v. State, 733 S.E.2d 395, No. A12A1649, 2012 Ga. App. LEXIS 857 (2012).

Sufficient evidence existed to support the defendant's conviction for armed robbery based on the fact that while the defendant may not have had a gun, the defendant drove the car and remained in the vehicle while the codefendant took the victim's backpack at gunpoint and, after the armed robbery had occurred, the defendant appeared to wait for the codefendant to return to the vehicle before driving away; whether the defendant was a party to the crime and aided and abetted the codefendant was a jury question, and the jury rejected the defendant's argument that the defendant had no knowledge of the robbery and was merely driving the car. Teele v. State, 319 Ga. App. 448, 738 S.E.2d 277 (2012).

Sufficient evidence supported the defendant's armed robbery, false imprisonment, aggravated assault, and possession of a firearm during a felony conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Trial court erred in granting the defendant's motion for new trial as the evidence was sufficient to find the defendant intentionally helped in the commission of the murder and related crimes and was a party to the offenses because the defendant brought the gun used to kill the victim; the defendant stood over the victim after the accomplice shot the victim at close range and made a statement indicating the defendant's approval of the shooting; and the defendant fled from the scene with the accomplice, leaving the victim for dead. State v. Jackson, 294 Ga. 9, 748 S.E.2d 902 (2013).

Cited in Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

16-2-22. Criminal responsibility of corporations.

JUDICIAL DECISIONS

Liability for theft. — Corporation could only be criminally liable for theft in Georgia pursuant to O.C.G.A. § 16-2-22(a)(2) for crimes by an officer or official who was acting within the scope of his employment on behalf of the corporation, as the applicable theft statutes did not contain language that clearly indicated a legislative purpose to impose liability on a corporation. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

CHAPTER 3

DEFENSES TO CRIMINAL PROSECUTIONS

ARTICLE 1

RESPONSIBILITY

16-3-2. Mental capacity; insanity.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

For comment, "Saving the Deific Decree Exception to the Insanity Defense in Illinois: How a Broad Interpretation of 'Religious Command' May Cure Establishment Clause Concerns," see 46 J. Marshall L. Rev. 56 (2013).

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Jury charges correctly stating law. Instruction on self-defense did not result in reversible error because the trial court fully and adequately charged and recharged on the issue of self-defense, including the statutory language "reasonably believes" in O.C.G.A. § 16-3-21(a), and on the state's burden to prove beyond a reasonable doubt that the defendant was not justified. Hill v. State, 290 Ga. 493, 722 S.E.2d 708 (2012).

Defendant failed to prove insanity at the time of the crime. There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defendant's efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant's actions, that the defendant's statement to police that the defendant acted in self-defense was a rational motive for the defendant's escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the de-

Application (Cont'd)

fendant introduced no evidence of insanity, only lay witness testimony about generalized problems. McBride v. State, 314 Ga. App. 725, 725 S.E.2d 844 (2012).

Failure to plead insanity defense. — Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

16-3-3. Delusional compulsion.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

For comment, "Saving the Deific Decree Exception to the Insanity Defense in Illinois: How a Broad Interpretation of 'Religious Command' May Cure Establishment Clause Concerns," see 46 J. Marshall L. Rev. 56 (2013).

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Failure to instruct on justification as necessary component. — Trial court erred in failing to instruct the jury on justification as a necessary component of the delusional compulsion defense. Woods v. State, 291 Ga. 804, 733 S.E.2d 730 (2012).

Psychotic feature of mental illness altered by drug usage. — Defendant was not entitled to a directed verdict on the basis of an insanity defense because, although the evidence showed that the defendant suffered from mental illness, the jury was permitted to believe the state's expert, who opined that, even if there was a psychotic feature, it was masked by the fact that the defendant voluntarily altered the defendant's state of mind by smoking marijuana. Simon v. State, 321 Ga. App. 1, 740 S.E.2d 819 (2013).

Defendant failed to prove insanity at the time of the crime.

There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defendant's efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant's actions, that the defendant's statement to police that the defendant acted in self-defense was a rational motive for the defendant's escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

16-3-4. Intoxication.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Voluntary drunkenness furnishes no excuse for crime.

Defendant's conviction was affirmed because the evidence showed that the defendant voluntarily consumed alcohol; and the defendant's ability after the night of the incident to recall events from that evening as evidenced by the defendant's apology to the business owner two days later and by the defendant's testimony at trial, showed that any alteration of the defendant's brain function that night was not more than temporary. Anderson v. State, 319 Ga. App. 701, 738 S.E.2d 285 (2013).

Application to Specific Crimes

Intoxication did not disprove intent to commit burglary. — Evidence was sufficient to support the defendant's burglary conviction since the jury decided that evidence of the defendant's intoxication did not disprove intent. In addition to testimony about television wires having been disconnected from various devices in the victim's house, one witness testified that the television was sitting upright on the floor, not face-down, despite the defendant's testimony that the defendant had knocked the television off the stand. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

16-3-5. Mistake of fact.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Defendant's belief did not constitute mistake of fact. — Defendant's belief that the victim was not in the trajectory of the bullet when the defendant intentionally fired the weapon at a third party does not constitute the type of mistake of fact that would serve as a defense to malice murder or other crimes. Allen v. State, 290 Ga. 743, 723 S.E.2d 684 (2012).

Cited in Floyd v. State, 319 Ga. App. 564, 737 S.E.2d 341 (2013).

Jury Instructions

Charge on mistake of fact not warranted.

With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in refusing to instruct the jury on mistake of fact because the affirmative defense did not apply since the intended victim told the defendant that the victim was underage and, having been made aware of that fact, the defendant nevertheless continued the contact, engaging the intended victim in sexually explicit conversations and arranging to meet for a sexual encounter. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Trial court did not err in failing to charge the jury on mistake of fact as the defense to burglary; the defendant believed the defendant could enter the house with impunity because the house was for sale was based on mistake of law rather than mistake of fact. Stillwell v. State, 329 Ga. App. 108, 764 S.E.2d 419 (2014).

Jury Instructions (Cont'd)

Charge on mistake of fact warranted. — Because a defendant's evidence that the defendant acted under a misapprehension of fact in entering a house would have authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. Price v. State, 289 Ga. 459, 712 S.E.2d 828 (2011).

Trial court did not err in refusing to charge mistake of fact, etc.

Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of fact that would serve as a defense to the defendant's unauthorized entry into the home since the evidence was uncontroverted that the defendant was not invited into the home. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Trial court did not err by failing to give the defendant's requested jury charge on the defense of mistake of fact, pursuant to O.C.G.A. § 16-3-5, because the charge was not authorized by the evidence as the evidence did not show that the defendant was working as a confidential informant at the time when drugs were found in an inventory search of the defendant's vehicle before the impoundment of the vehicle for the defendant not having a driver's license and insurance for the vehicle. Ahmad v. State, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Requested instruction should have been given. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court should have provided the jury with a requested instruction on mistake of fact pursuant to O.C.G.A. § 16-3-5, as defendant's knowledge of a plan or intent to rob was a material element of the charge and there was evidence that might have supported defendant's version of events. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

16-3-6. Affirmative defenses to certain sexual crimes.

(a) As used in this Code section, the term:

(1) "Coercion" shall have the same meaning as set forth in Code Section 16-5-46.

(2) "Deception" shall have the same meaning as set forth in Code Section 16-5-46.

(3) "Sexual crime" means prostitution, sodomy, solicitation of sodomy, or masturbation for hire as such offenses are proscribed in Chapter 6 of Title 16.

(4) "Sexual servitude" shall have the same meaning as set forth in Code Section 16-5-46.

(b) A person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed by an accused who was:

(1) Less than 18 years of age at the time of the conduct such person was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46; or

(2) Acting under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46.

(c) A defense based upon any of the provisions of this Code section shall be an affirmative defense. (Code 1981, § 16-3-6, enacted by Ga. L. 2011, p. 217, § 3/HB 200; Ga. L. 2015, p. 675, § 4-1/SB 8.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (b) for the former provisions which read: "A person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46."

Cross references. — Modification of orders of adjudicated delinquent children for sexual crimes, § 15-11-32.

Editor's notes. — Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

ARTICLE 2
JUSTIFICATION AND EXCUSE

16-3-20. Justification.

The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed:

(1) When the person's conduct is justified under Code Section 16-3-21, 16-3-23, 16-3-24, 16-3-25, or 16-3-26;

(2) When the person's conduct is in reasonable fulfillment of his duties as a government officer or employee;

(3) When the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis;

(4) When the person's conduct is reasonable and is performed in the course of making a lawful arrest;

(5) When the person's conduct is justified for any other reason under the laws of this state, including as provided in Code Section 51-1-29; or

(6) In all other instances which stand upon the same footing of reason and justice as those enumerated in this article. (Code 1933, § 26-901, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2015, p. 598, § 2-2/HB 72.)

The 2015 amendment, effective July 1, 2015, inserted ", including as provided in Code Section 51-1-29" in paragraph (5).

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTION

Jury Instruction

Defendant was not entitled to an instruction on the defense of justification, etc.

Trial court did not err in not charging the jury on the omnibus justification defense because the defendant's argument that the defendant feared for the lives of the defendant's family at the hands of a codefendant, as well as the defendant's own life, if the defendant did not do what the codefendant wished did not fall under the omnibus justification defense as there was not a current or imminent threat because there was no evidence that the codefendant was in a position to harm the defendant's family when the defendant committed the acts. Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

Defendant was not entitled to a jury instruction on justification because, under the defendant's version of events, the damage to the parked cars resulted from an unavoidable accident; the defendant's testimony as to the reasons for the deci-

sion to steer the truck towards the parked cars, to avoid people, served to support the defendant's accident defense, and such a position was inconsistent with a justification defense. Jackson v. State, 329 Ga. App. 240, 764 S.E.2d 569 (2014).

Ineffective assistance not found.

Trial counsel was not ineffective for failing to object to the trial court's jury charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant's conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court's jury charge on justifiable parental discipline would have lacked merit. Tabb v. State, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

16-3-21. Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Double jeopardy did not bar retrial. — Defendant's acquittal on malice murder charges under O.C.G.A. § 16-5-1(c) did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because the acquittal did not necessarily mean that the defendant acted in self-defense under O.C.G.A. § 16-3-21(a); if the jury did not find that the defendant acted with either express or implied malice, the jury had to acquit the defendant of malice murder. Roesser v. State, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Cited in Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013); Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013).

Jury Charge

1. In General

Charge that self-defense inapplicable when in process of committing felony. — Trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that self-defense was inapplicable when the defendant was attempting to commit or was committing a felony because the defendant made an affirmative choice to engage in a dangerous and potentially violent criminal activity when the defendant participated in a drug transaction. Davis v. State, 290 Ga. 757, 725 S.E.2d 280 (2012).

Self-defense instruction not warranted.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the evidence did not support the giving of the charge; there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the victim's mother's house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by refusing to

Jury Charge (Cont'd)
1. In General (Cont'd)

charge the jury on the affirmative defense of self-defense because the defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. Ransom v. State, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

Appellant failed to show ineffective assistance of counsel for failing to emphasize certain testimony from an investigator that supported a claim of self defense because co-indictees testified that they did not see appellant and the victim fight or the victim with a weapon and trial counsel testified that they agreed to focus on appellant's character instead of self-defense and a jury instruction that deadly force was not justified during a felony would have been required. Jones v. State, 294 Ga. 501, 755 S.E.2d 131 (2014).

Justification instruction not warranted. — Trial court did not err by declining to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because defendant declined to testify at trial or present any defense witnesses to support a justification defense, and the defendant's cross-examination of the state's witnesses did not reveal any evidence that would support such a defense. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

There was no evidence to support the giving of a jury charge on justification, because the defendant hit the defendant's wife in the face with a trophy, requiring sutures, while the defendant did not even appear to have been in a fight. Hudson v. State, 325 Ga. App. 657, 754 S.E.2d 626 (2014).

In a case where the defendant, an inmate, was convicted of the aggravated assault and aggravated battery of the victim, another inmate, the trial court did not commit any error in declining to charge the jury on the defense of justification because there was no evidence to support the defense as the defendant declined to testify at trial or present any defense witnesses to support a justification defense; the defendant's cross-examination of the state's witnesses did not reveal any evidence that would support a defense of justification; and the detention officer's testimony that the defendant had a mild abrasion or a cut over one eye, without more, clearly was insufficient to support a justification charge. Boutier v. State, 328 Ga. App. 869, 763 S.E.2d 255 (2014).

Charging language of Code section sufficient.

Trial court did not err in charging the jury on self-defense in the language of O.C.G.A. § 16-3-21(b)(3) because assuming that there was no evidence that the defendant was the aggressor, the charge was at most merely irrelevant, being one of a number of stated exceptions to the rule concerning the use of force in self-defense. Neal v. State, 290 Ga. 563, 722 S.E.2d 765 (2012).

Lack of evidence to support jury charge on justification.

Defendant's counsel was not ineffective for failing to request jury charges on the excessive use of force or on lack of justification under O.C.G.A. § 16-3-21(b)(1) and (b)(3) because two corrections officers did not use excessive force as a matter of law in subduing the defendant when, while incarcerated in a county jail, the defendant took two dinner trays, refused to put one back, and fought and choked an officer who took the trays away. Williams v. State, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of "justifiable homicide" contained in the defendant's request was inconsistent with and had been superseded by the current statutory scheme for the affirmative offense of justification; the existence of "reasonable fears" is irrelevant to the consideration of voluntary manslaughter. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because counsel for the defendant

characterized the defense as an "imperfect self-defense," a form of voluntary manslaughter that was not recognized in Georgia. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were "stealing" the defendant's vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to clean up property; thus, there was no evidence of any imminent threat of harm to justify the defendant's use of force under O.C.G.A. § 16-3-21(a). Adcock v. State, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

With regard to the defendant's domestic violence convictions, because the defendant acquiesced to the trial court's decision not to charge on justification, the issue of the trial court's refusal to give the requested charge was waived on appeal. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Charge on mutual combat not adjusted to the evidence. — Trial court's refusal to give the defendant's requested jury instruction on mutual combat, O.C.G.A. § 16-3-21(b)(3), did not constitute plain error under O.C.G.A. § 17-8-58(b) because a charge on mutual combat was not adjusted to the evidence; there was no evidence of intent to engage in a mutual fight or combat by agreement. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

Defendant could not challenge requested instruction. — Defendant's challenge to the instruction on justification failed as counsel did not object to the portion of the self-defense instruction tracking O.C.G.A. § 16-3-21(b)(2), and indeed requested that the trial court give the pattern charge including that language. Woodard v. State, 296 Ga. 803, 771 S.E.2d 362 (2015).

Request to charge on mutual combat was not ineffective assistance. — In a murder case in which the lawyers pursued not only a justification defense, but also voluntary manslaughter as an alternative to murder, it was not unreasonable to request a charge on mutual combat, even though the request might have impaired the justification defense because the request aided the voluntary manslaughter alternative. State v. Mobley, 770 S.E.2d 1, No. S14A1329, 2015 Ga. LEXIS 146 (2015).

Trial counsel not ineffective.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be considered deficient for failure to pursue those defenses. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

2. Content

Defense entitled to jury charge as to retreat.

Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant's sole defense, and the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of the defendant, by the defendant's explanation of why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor's closing argument; the evidence of the defendant's guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. Hill v. State, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Charge fairly represented issue of justification. — Trial court did not err in failing to include certain language in the court's charge on justification because the charge as a whole fairly represented the issue of justification; inasmuch as the charge as a whole was not an incorrect statement of the law, and the charge instructed the jury that the defendant was justified in using self defense against the "imminent use of unlawful force and against great bodily injury", the trial court's omission of the phrase "or to prevent the commission of a forcible felony" did not undermine the legal adequacy of the charge. Milinavicius v. State, 290 Ga. 374, 721 S.E.2d 843 (2012).

Jury Charge (Cont'd)
2. Content (Cont'd)

Defendant not entitled to justification charge.

Based on the evidence supporting the defendant's participation in a felony drug transaction at the time of the fatal shooting of the victim, the trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that a person was not justified in using force in defense of self or others if the person was attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; the defendant affirmatively chose to engage in the potentially dangerous and violent criminal business of a felony drug deal before the fatal confrontation with the victim took place. Smith v. State, 290 Ga. 768, 723 S.E.2d 915 (2012).

Jury instruction based on domestic violence report statute was error. — Jury charge based on O.C.G.A. § 17-4-20.1(a) and (b) was not supported by the evidence because only one of the two parties involved in a domestic dispute reported the incident to law enforcement, and the error was not harmless because it could have led the jury to conclude that the defendant, who was arrested, was the primary aggressor, and undermined the defense of self-defense, which was not permitted under O.C.G.A. § 16-3-21 if the defendant was the aggressor. Dean v. State, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Defendant not entitled to instruction on involuntary manslaughter.

Defendant's requested charge on misdemeanor involuntary manslaughter was not justified by the defendant's statement to police that the victim attacked the defendant and that the defendant accidentally strangled the victim in an attempt to restrain the victim because one who sought to justify homicide as having been committed in self-defense was not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792 (2014).

Application

Failure to make prima facie showing of self-defense. — Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Victim's character admissible only after prima facie showing of self-defense. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's alleged violent acts against third parties inadmissible. — Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant mind at the time the defendant killed the victim. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012).

When use of force not justified.

The defendant failed to make a prima facie showing that the defendant acted in self-defense when the defendant shot the victim because the defendant was the aggressor and the victim would have been justified in using force to subdue the defendant; the trial court did not abuse the

court's discretion in excluding evidence of the victim's propensity for violence. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence authorized jury to believe that the defendant did not act in self-defense.

Evidence was sufficient to support the defendant's conviction for voluntary manslaughter because the defendant's testimony that the initial shot to the victim's head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been shot in the head, from the victim's assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant's claim of self-defense, given the number of gunshots fired. Davis v. State, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Evidence was sufficient to enable the jury to find beyond a reasonable doubt that the defendant did not act in self-defense under O.C.G.A. § 16-3-21(a) because, even if the jury accepted the defendant's version of events preceding the shooting of the two victims, the jury was authorized to conclude that, having wrestled control of one of the victim's gun, the defendant used excessive force in shooting the two unarmed victims and/or in continuing to fire at the victims after the victims had fallen to the ground. Jimmerson v. State, 289 Ga. 364, 711 S.E.2d 660 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. Hill v. State, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self defense, when the defendant shot an unarmed victim. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the evidence showed that the victim was shot and killed by a caliber of gun different from that which the victim was known to carry, and the defendant was seen checking the chamber of a gun which a witness thought was of the same caliber used to shoot the victim, the jury was entitled to disbelieve the defendant's claim of self-defense. Murray v. State, 295 Ga. 289, 759 S.E.2d 525 (2014).

Evidence of justification.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim that could have caused the defendant great bodily injury, the defendant was justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2. State v. Green, 289 Ga. 802, 716 S.E.2d 194 (2011).

Evidence sufficient to disprove justification defense.

Evidence failed to support the defendant's claim of justification or self-defense although the defendant and the victim engaged in a fight before the defendant shot the victim because the fight had ended at the time the defendant retrieved

Application (Cont'd)

a gun. Willis v. State, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

Denial of a defendant's pretrial motion for immunity, based on a claim of justification, was proper because the evidence showed that the shooting was motivated by gang rivalry and a desire for revenge, rather than self-defense. Sifuentes v. State, 293 Ga. 441, 746 S.E.2d 127 (2013).

Self defense claim rejected.

Defendant's claim of self-defense failed because the evidence was sufficient to support the state's theory that the defendant provoked the victim's use of force, including evidence that the defendant participated in the robbery of the victim, pursued the victim, and then laid in wait for the victim. Mingledolph v. State, 324 Ga. App. 157, 749 S.E.2d 757 (2013).

Evidence was sufficient to convict the defendant of malice murder as the defendant admitted to firing two shots from the passenger's side of the car while leaning over the roof; a bullet hit the first victim in the neck, severing the first victim's spine and spinal cord; the first victim died several days later after being removed from life support; the first victim died as a result of the injuries inflicted by defendant as the first victim's injuries were such that the first victim could not live once life support systems were removed; and the defendant did not act in self defense. Browder v. State, 294 Ga. 188, 751 S.E.2d 354 (2013).

Victim's violent acts. — Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification because the key showing must be that the victim was the aggressor in the fatal encounter. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012).

Insufficient evidence to support instruction on self-defense. — Trial court did not err in failing to instruct the jury on the affirmative defense of self-defense because the record showed that the victim moved towards the defendant because the defendant threatened the victim with a revolver and both eyewitnesses testified that the victim grabbed the arm of the hand holding the gun and pointed the gun away from everyone. Brunson v. State, 293 Ga. 226, 744 S.E.2d 695 (2013).

Immunity properly found. — Evidence was sufficient for the trial court to determine that the defendants met the defendants' burden of proving that the defendants were entitled to immunity from prosecution pursuant to O.C.G.A. § 16-3-24.2 because the defendants' testimony provided some evidence that the defendants' actions were justified, and the state chose to present no contrary testimony. State v. Cooper, 324 Ga. App. 32, 749 S.E.2d 35 (2013).

Trial counsel not ineffective. — In a murder case, trial counsel was not ineffective for arguing that the defendant was not guilty of attempting to violate the Georgia Controlled Substances Act because the defendant had abandoned the drug deal at time of the shooting and that the shooting was in self-defense in light of limited defense options that were available and the evidence against the defendant. Moore v. State, 294 Ga. 453, 754 S.E.2d 344 (2014).

16-3-23. Use of force in defense of habitation.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Inapplicable when violent acts committed by someone other than victim. — Trial court did not err by excluding evidence that the defendant was attacked by a third party during a previous home invasion, which the defendant sought to introduce to support an affirmative defense of justification in using force to defend the habitation, because the de-

fense was not available to a defendant for violent acts or abuse committed against a defendant by someone other than the victim. Watson v. State, 328 Ga. App. 832, 763 S.E.2d 122 (2014).

Request for immunity defense properly denied. — Trial court's denial of immunity from prosecution based on defense of habitation was supported by a victim's testimony that the victims did not enter the defendant's home in a violent and tumultuous manner for the purposes of committing a felony therein, but were invited in by the defendant, who threatened and assaulted them. Inman v. State, 294 Ga. 650, 755 S.E.2d 752 (2014).

Jury charge on defense of habitation.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because counsel for the defendant characterized the defense as an "imperfect self-defense," a form of voluntary manslaughter that was not recognized in Georgia. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by failing to give the jury the defendant's request to charge on the defense of habitation under O.C.G.A. § 16-3-23 because the evidence that the victim was intoxicated and had cursed at the defendant earlier that evening simply did not meet the statutory standard; there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the victim's mother's house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial counsel was not ineffective for failing to request a jury charge on the defense of habitation under O.C.G.A. § 16-3-23(1) because there was no basis for an instruction on defense of habitation; the jury was charged on the law of self-defense, but rejected that defense, and the defendant did not establish how a jury charge on the defense of habitation would have raised a reasonable probability that the outcome of the case would have been different. Hill v. State, 290 Ga. 493, 722 S.E.2d 708 (2012).

Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were "stealing" the defendant's vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to clean up property; thus, there was no evidence of an unlawful entry into the defendant's habitations that would have justified the defendant's use of force under O.C.G.A. § 16-3-23. Adcock v. State, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

Trial testimony did not provide the slight evidence necessary to support an instruction on the defense of habitation because the evidence showed that the defendant exited the van and began fighting after the van stopped, at a time when no attack was even arguably being made on the van. Andrade v. State, 319 Ga. App. 75, 733 S.E.2d 474 (2012).

Trial court did not err in failing to charge the jury on the defense of habitation under O.C.G.A. § 16-3-23(2), despite the defendant's failure to request charge, because it was not the defendant's sole defense and the omission of the unrequested charge was not clearly harmful as a matter of law. Barrett v. State, 292 Ga. 160, 733 S.E.2d 304 (2012).

Trial court did not err in not charging the jury on defense of a habitation because the victim neither entered the defendant's home unlawfully nor attacked the defendant's home; the victim was on the defendant's porch by permission; and the witnesses testified that the victim had been stabbed and was on the ground when the victim's friends started throwing things at the defendant's apartment and around the porch. Neverson v. State, 324 Ga. App. 322, 750 S.E.2d 397 (2013).

Defendant was not entitled to a charge on the defense of habitation because the defense did not apply to the use of force against another person's property and there was no evidence that the victim attempted to enter or attack the defendant's habitation. Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013).

General Consideration (Cont'd)

Counsel was not ineffective for failing to present defense.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be considered deficient for failure to pursue those defenses. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. Philpot v. State, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Cited in Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

16-3-23.1. No duty to retreat prior to use of force in self-defense.

JUDICIAL DECISIONS

Reversible error in failing to charge jury on lack of duty to retreat. — Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant's sole defense, and the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of the defendant, by the defendant's explanation of why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor's closing argument; the evidence of the defendant's guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. Hill v. State, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Plain error not shown for failing to charge on no duty to retreat. — Under a plain error analysis in the defendant's trial for murder, the trial court did not err when the court failed to charge the jury that one acting in defense of self has no duty to retreat because the jury charges given in the case fairly informed the jury as to the law of self-defense and the defendant failed to affirmatively show that the failure to charge on the duty to retreat probably affected the outcome of the trial. Shaw v. State, 292 Ga. 871, 742 S.E.2d 707 (2013).

16-3-24. Use of force in defense of property other than a habitation.

JUDICIAL DECISIONS

No evidence to support instruction on justification. — Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were "stealing" the defendant's vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to clean up property; thus, there was no evidence of tortious or criminal interference with the defendant's property to justify a jury instruction on the use of force under O.C.G.A. § 16-3-24. Adcock v. State, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

16-3-24.1. Habitation and personal property defined.

JUDICIAL DECISIONS

Cited in Andrade v. State, 319 Ga. App. 75, 733 S.E.2d 474 (2012).

16-3-24.2. Immunity from prosecution; exception.

A person who uses threats or force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal prosecution therefor unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 of Article 4 of Chapter 11 of this title. (Code 1981, § 16-3-24.2, enacted by Ga. L. 1998, p. 1153, § 1.2; Ga. L. 1999, p. 81, § 16; Ga. L. 2006, p. 477, § 2/SB 396; Ga. L. 2014, p. 599, § 1-3/HB 60.)

The 2014 amendment, effective July 1, 2014, deleted "or 3" following "Part 2" in this Code section.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Impact of jury's rejection of justification defense. — To the extent it holds that O.C.G.A. § 16-3-24.2 does not apply once a jury rejects the defendant's justification defense, the Georgia Supreme Court overrules the Georgia Court of Appeals' decision in Eason v. State, 261 Ga. App. 221 (2003). Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013).

Reconsideration of pretrial ruling on immunity. — Appellate court erred by reversing a trial court order granting the defendant a new trial because the trial court had the inherent authority to reconsider the court's pretrial ruling on the defendant's motion for immunity from criminal prosecution under O.C.G.A. § 16-3-24.2 and to rule otherwise. Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013).

Immunity properly found.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim that could have caused the defendant great bodily injury, the defendant was justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2. State v. Green, 289 Ga. 802, 716 S.E.2d 194 (2011).

Evidence was sufficient for the trial court to determine that the defendants met the defendants' burden of proving that the defendants were entitled to immunity from prosecution pursuant to O.C.G.A. § 16-3-24.2 because the defendants' testimony provided some evidence that the defendants' actions were justified, and the state chose to present no contrary testimony. State v. Cooper, 324 Ga. App. 32, 749 S.E.2d 35 (2013).

Immunity motion properly denied.

Denial of a defendant's pretrial motion for immunity, based on a claim of justification, was proper because the evidence showed that the shooting was motivated by gang rivalry and a desire for revenge,

rather than self-defense. Sifuentes v. State, 293 Ga. 441, 746 S.E.2d 127 (2013).

Trial court's denial of immunity from prosecution based on defense of habitation was supported by a victim's testimony that the victims did not enter the defendant's home in a violent and tumultuous manner for the purposes of committing a felony therein, but were invited in by the defendant, who threatened and assaulted them. Inman v. State, 294 Ga. 650, 755 S.E.2d 752 (2014).

16-3-25. Entrapment.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JURY CHARGE

General Consideration

Expert testimony on predisposition excluded. — Trial court did not abuse the court's discretion in ruling that whether the defendant would have committed the crime charged absent the inducement of law enforcement officers was a question for the jury without the assistance of expert opinion evidence because expert testimony that a defendant does not have the psychological characteristics of a person who is predisposed to having sexual contact with under-aged children invades the province of the jury as to the ultimate issue. Lopez v. State, 326 Ga. App. 770, 757 S.E.2d 436 (2014).

Jury Charge

Charging jury in language of law. Counsel's failure to object to the denial of counsel's request to instruct a jury on the definition of "incitement" in the context of an entrapment instruction was not ineffective assistance because "incitement," as used in O.C.G.A. § 16-3-25, was a term of common knowledge. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

16-3-26. Coercion.

JUDICIAL DECISIONS

Coercion not a defense to murder. Trial court did not err in not charging the jury on the omnibus justification defense based on any claim that the defendant was under an immediate threat because that defense, like coercion, was not a defense to the victim's murder. Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

Defense of coercion predicated on reasonable person standard. — Trial court did not err in determining that the proffered evidence from a psychiatrist that the defendant was susceptible to being led into crime by another person to a greater extent than most people was irrelevant because the defense of coercion was predicated on the reasonable person standard, not the subjective situation of the defendant. Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

Coercion is no defense, etc. Trial court did not err by refusing to charge the jury on the defense of coercion under O.C.G.A. § 16-3-26 because the threat of violence to the defendant from a co-defendant did not occur during the crimes but while they were driving to the scene of the robbery. Additionally, the co-defendant walked off for a period of time prior to the crimes and the defendant could have left the scene but did not. Calmes v. State, 312 Ga. App. 769, 719 S.E.2d 516 (2011), cert. denied, No. S12C0538, 2012 Ga. LEXIS 324 (Ga. 2012).

It is for jury to determine whether there was coercion.

Defendant's claim of duress and coercion, under O.C.G.A. § 16-3-26, did not require reversal of the defendant's convictions because the jury, being properly charged on this defense, was authorized to reject the defense. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

ARTICLE 3

ALIBI

16-3-40. Alibi.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Failure to call alibi witness. — Defendant failed to show that trial counsel was ineffective for failing to call the defendant's mother as an alibi witness because the prosecutor suggested there was a possibility that the state would call the mother as a part of the state's case in chief, suggesting that the mother's testimony was favorable to the state and trial counsel's testimony that there was a reason for not calling the mother but that counsel could not remember was supported by the state's plan to call the witness. Benjamin v. State, 322 Ga. App. 8, 743 S.E.2d 566 (2013).

CHAPTER 4

CRIMINAL ATTEMPT, CONSPIRACY, AND SOLICITATION

16-4-1. Criminal attempt.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Relationship to other laws. — Defendant's prior conviction for attempted armed robbery pursuant to an Alford plea qualified as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because the record showed that the defendant's plea was knowing and voluntary, and supported by a factual basis. United States v. Wade, 2014 U.S. App. LEXIS 302 (11th Cir. Jan. 8, 2014) (Unpublished).

Sufficient evidence. — Defendant's conviction of criminal attempt to commit burglary was affirmed because, while the defense presented a different theory of events and claimed that defendant did not act with the intent to commit a theft, it was the jury's province to assess witness

General Consideration (Cont'd)

credibility, resolve the conflicts in the evidence, and determine whether there was a reasonable hypothesis of innocence favorable to defendant. Anthony v. State, 317 Ga. App. 807, 732 S.E.2d 845 (2012).

Indictment sufficient with regard to Internet sting operation allegations. — With regard to an indictment charging the defendant with computer pornography, attempted aggravated child molestation, and attempted child molestation arising from an Internet sting operation, the appellate court erred by finding that a second indictment was insufficient to withstand a special demurrer because the indictment identified the victim by the only name which the defendant knew the intended victim by and informed the defendant that the intended victim was not an actual child. State v. Grube, 293 Ga. 257, 744 S.E.2d 1 (2013).

Indictment sufficient. — Trial court did not err by denying defendant's motion for a new trial on the ground that the indictment was defective for failing to allege the essential element of intent to commit a theft because the indictment clearly charged that defendant attempted to commit a burglary, not that the defendant completed the crime. Coleman v. State, 318 Ga. App. 478, 735 S.E.2d 788 (2012).

Trial court properly denied the defendant's motion for arrest of judgment because the indictment charged attempted aggravated child molestation based on the defendant's act of asking the victim if the victim performed a certain sexual action and referred to the statutory language for attempt and aggravated child abuse as well as specifically alleged that the victim was under the age of sixteen, thus, the indictment sufficiently placed the defendant on notice of the charges. Ashmore v. State, 323 Ga. App. 329, 746 S.E.2d 927 (2013).

Effective assistance of counsel in attempted rape trial. — Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Cited in Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013); State v. Cosmo, 295 Ga. 76, 757 S.E.2d 819 (2014).

Application

Sufficiency of indictment.

Trial court did not err in granting the defendant's special demurrer and dismissing the indictment charging the defendant with attempted child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4, attempted aggravated child molestation, §§ 16-4-1 and 16-6-4(c), and computer pornography, O.C.G.A. § 16-12-100.2(d) because the indictment contained inadequate information as to the alleged victim; attempted child molestation, attempted aggravated child molestation, and computer pornography are crimes against a particular person and require the victim to be identified in the indictment, even if the victim was a police officer using a pseudonym. State v. Grube, 315 Ga. App. 885, 729 S.E.2d 42 (2012).

Offense of enticing.

Defendant's conviction for criminal attempt to entice a child for indecent purposes, under O.C.G.A. §§ 16-4-1 and 16-6-5(a), was reversed because: (1) the victim's compliance with the defendant's request to send the defendant a naked picture of the victim would not have satisfied the element of asportation since the request did not try to entice the victim to go to another place; (2) without evidence that the defendant tried to move the victim "any place whatsoever," the state did not prove the defendant had the requisite intent to commit the crime of enticing a child and that the defendant took a substantial step toward committing that crime; so (3) the state presented insufficient evidence to prove all elements of the only crime with which the state charged the defendant. Heard v. State, 317 Ga. App. 663, 731 S.E.2d 124 (2012).

Sexual offenses with minors initiated over the Internet.

When the defendant was charged with using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant stated the defendant wanted "a lot of oral," after the defendant learned that the person was 14 years old; (2) the defendant discussed with the person how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant's actual age; (3) the defendant left the defendant's home of Tennessee to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant's statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any "accidents" in the event the defendant was able to have sex with the person. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Sufficient evidence supported defendant's conviction for criminal attempt to entice a child for indecent purposes based on the evidence that defendant thought the intended victim was a 15-year-old girl with whom defendant continued to contact, engaged in sexually explicit conversations, and arranged to meet for a sexual encounter, and although defendant introduced some evidence in the form of an e-mail to support the claim that defendant believed defendant was dealing with an adult, that evidence was not conclusive and it was for the jury to determine defendant's truthfulness. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Evidence that the defendant traveled from Tennessee to an arranged location in Georgia to have sexual intercourse with a person the defendant thought to be a 14-year-old girl, a substantial step toward committing the offense of criminal attempt to commit child molestation, was sufficient to support the defendant's conviction for attempt to commit child molestation. The fact that the girl did not actually exist and thus, the defendant was never in the child's presence did not preclude the defendant's conviction. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36, was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Evidence sufficient for conviction of attempt to commit burglary.

With regard to the defendant's conviction for attempted burglary, sufficient evidence supported the conviction because the jury evaluated the nature of the circumstances of the morning's events, as well as the daughter's eyewitness testimony identifying the defendant and, although the defendant explained that it was mistakenly the wrong house, the jury was authorized to come to a different and reasonable conclusion based on the state's case. White v. State, 323 Ga. App. 660, 744 S.E.2d 857 (2013).

Evidence was sufficient to sustain the defendant's attempted burglary conviction since the victim testified that, after the victim woke and saw the defendant outside, the victim found the screen to an open window on the hood of the victim's

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car and found a piece of carpet the victim had left in the window sill for the victim's cat to sit on in the yard. The jury thus could have found that the defendant removed the screen in an attempt to gain entrance into the house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Evidence sufficient for criminal attempt to commit theft by receiving stolen property. — Evidence that the informant told the defendant that the items being pawned were not "hot, hot," the defendant's failure to put serial numbers of the items on the pawn tickets or property-tracking website, the defendant's instructions to the informant to remove the packaging of one of the new items, and the defendant's admission that the defendant had been suspicious of the informant was sufficient to support defendant's conviction for criminal attempt to commit theft by receiving stolen property. Miller v. State, 323 Ga. App. 412, 744 S.E.2d 926 (2013).

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime; thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Evidence sufficient for criminal attempt to commit armed robbery.

Victim's testimony that defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was sufficient to support the defendant's convictions for criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Sufficient evidence supported the defendant's convictions for two counts of armed robbery with respect to two victims at the first residence, attempt to commit armed robbery with respect to one of the victims at the first residence, and two counts of burglary with respect to the two residences because the accomplice testimony was sufficiently corroborated by one of the witnesses, who identified the defendant. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Attempted drug trafficking.

Sufficient evidence supported the defendant's conviction for criminal attempt to commit trafficking in cocaine based on the trial evidence establishing that the defendant negotiated for and attempted to purchase one kilogram of cocaine from an undercover investigator, that the defendant took substantial steps and actively participated in the attempted drug offense by meeting with the undercover investigator at the designated location and at the arranged time for the purpose of conducting the transaction and by executing the bill of sale for a vehicle in exchange for the drug purchase, and by taking possession of the package of cocaine and cutting the package open to examine the contents. Tehrani v. State, 321 Ga. App. 685, 742 S.E.2d 502 (2013).

Sufficient evidence existed to support the defendant's conviction for attempted trafficking by manufacturing methamphetamine based on the evidence that the defendant lived at the residence wherein the meth lab was discovered as shown by the owner's testimony and another witness who testified that the defendant slept at the home nightly and material used in the red phosphorous process for manufacturing methamphetamine was seized from the residence. Franks v. State, 745 S.E.2d 666, No. A13A0932, 2013 Ga. App. LEXIS 533 (2013).

Evidence was sufficient to support both the defendants' convictions for attempted trafficking by manufacturing methamphetamine because the evidence connected the defendants to the house and the rooms in which the manufacturing components and the items containing methamphetamine residue were found; the police found lantern fuel in the house, which was commonly used as a solvent in methamphetamine labs; the chief of police, who was qualified as an expert witness, testified that the items seized appeared to have been used in the red phosphorous process for manufacturing methamphetamine; and a chemical odor associated with methamphetamine labs lingered around the house. Long v. State, 325 Ga. App. 488, 758 S.E.2d 604 (2013).

Criminal attempt not included in offense of shoplifting.

Because the offenses of criminal attempt to commit child molestation and computer child exploitation each required proof of a fact the other did not, the trial court did not err in sentencing the defendant on both convictions. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder as both convictions were established by the same conduct. Hernandez v. State, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Criminal attempt to commit theft from vehicle.

Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 a.m. amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Attempt to hijack a motor vehicle. — Given that a defendant repeatedly stabbed a victim in the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). Hickman v. State, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Attempted kidnapping.

Evidence that the defendant entered an occupied motor vehicle and commanded the driver to "drive or die," while wielding a rock in a sock supported the defendant's conviction for criminal attempt to commit kidnapping. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Similar transaction evidence admissible. — Based on the defendant's position that the defendant was not involved with a methamphetamine laboratory, as well as the similarity of the defendant's prior drug crime with criminal attempt to manufacture methamphetamine, the trial court did not abuse the court's discretion in admitting the evidence of the defendant's prior attempts to manufacture methamphetamine for the purpose of showing the defendant's bent of mind and course of conduct; the trial court was authorized to find that the probative value of the similar transaction evidence outweighed its prejudicial effect, and the trial court provided jury instructions that limited consideration of the similar transaction evidence to the appropriate purposes and provided guidance so as to diminish its prejudicial impact. Newton v. State, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior attempts to manufacture methamphetamine because the state needed the evidence of the defendant's prior drug conviction to show the defendant's bent of mind and course of conduct with respect to the methamphetamine offense at issue, criminal attempt to manufacture methamphetamine in violation of O.C.G.A. §§ 16-4-1 and 16-13-30(b); the defendant disclaimed any involvement with or knowledge of a methamphetamine laboratory. Newton v. State, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Abandonment defense disproved. — With regard to the defendant's convic-

Application (Cont'd)

tions for attempted child molestation, the state sufficiently defeated the defendant's defense of abandonment because while the defendant did leave the motel parking lot, it was not until the defendant viewed the task force agents wearing identifying t-shirts, communications through open car windows about the defendant's identification were already had, and the defendant left at a high rate of speed in an attempt to flee. Muse v. State, 323 Ga. App. 779, 748 S.E.2d 136 (2013).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault and attempted rape because under the circumstances the jury was authorized to conclude that the defendant's actions, although circumstantial insofar as intent was concerned, provided sufficient evidence to establish that the defendant attempted to rape the victim; the defendant knocked the victim down and attempted to pull the victim into an isolated vacant lot and continued to do so despite the victim's struggles and attempted escape. Wright v. State, 314 Ga. App. 353, 723 S.E.2d 737 (2012).

Evidence that the defendant owned the house where the ingredients and equipment were found, the defendant talked to the codefendant about whether the codefendant should abscond and bought the codefendant a truck, and the defendant made a list of pharmacy directions for the codefendant so that the codefendant could avoid legal restrictions on the purchase of ingredients was sufficient to support a conviction for attempt to manufacture methamphetamine. Taylor v. State, 320 Ga. App. 596, 740 S.E.2d 327 (2013).

Sufficient evidence supported the defendant's conviction for criminal attempt to commit child molestation based on the evidence that the defendant thought the intended victim was a 15-year-old girl with whom the defendant continued to contact, engaged in sexually explicit conversations, and arranged to meet for a sexual encounter, and although the defendant introduced some evidence in the form of an e-mail to support the claim that the defendant believed the defendant was dealing with an adult, that evidence was not conclusive, and it was for the jury to determine the defendant's truthfulness. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Conviction for attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. Smith v. State, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Sentencing.

Trial court erred in sentencing the defendant to 20 years to serve on the criminal attempt to commit robbery count because the maximum sentence the defendant could have received was 10 years as convicted of the offense of criminal attempt to commit a felony, not punishable by death or life imprisonment, could be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which the defendant could have been sentenced if the defendant had been convicted of the crime attempted; the maximum sentence for robbery was 20 years and half that time was 10 years. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

16-4-3. Charge of commission of crime as including criminal attempt.

JUDICIAL DECISIONS

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime; thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

16-4-5. Abandonment of effort to commit a crime as an affirmative defense.

JUDICIAL DECISIONS

No evidence of abandonment.

With regard to the defendant's convictions for attempted child molestation, the state sufficiently defeated the defendant's defense of abandonment because while the defendant did leave the motel parking lot, it was not until the defendant viewed the task force agents wearing identifying t-shirts, communications through open car windows about the defendant's identification were already had, and the defendant left at a high rate of speed in an attempt to flee. Muse v. State, 323 Ga. App. 779, 748 S.E.2d 136 (2013).

Trial counsel not ineffective. — In a murder case, trial counsel was not ineffective for arguing that the defendant was not guilty of attempting to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 et seq., because the defendant had abandoned the drug deal at the time of the shooting and that the shooting was in self-defense in light of limited defense options that were available and the evidence against the defendant. Moore v. State, 294 Ga. 453, 754 S.E.2d 344 (2014).

16-4-6. Penalties for criminal attempt.

JUDICIAL DECISIONS

Merger of counts for sentencing required. — Trial court erred by failing to merge the defendant's aggravated assault counts into the armed robbery count for purposes of sentencing because the offenses merged as a matter of fact, and as such, the aggravated assault conviction was the lesser offense and had to be merged into the attempted armed robbery conviction. Reed v. State, 318 Ga. App. 412, 734 S.E.2d 113 (2012).

Court erred in sentencing defendant to 30 years for attempted sodomy.

Trial court erred in sentencing the defendant to 20 years to serve on the criminal attempt to commit robbery count because the maximum sentence the defendant could have received was 10 years as convicted of the offense of criminal attempt to commit a felony, not punishable by death or life imprisonment, could be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which the defendant could have been sentenced if the defendant had been convicted of the crime attempted; the maximum sentence for robbery was 20 years; and half that time was 10 years. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

Cited in Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

16-4-8. Conspiracy to commit a crime.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

E-mails as evidence of conspiracy to murder. — Evidence that the defendant sent the co-conspirator e-mails entreating the co-conspirator to help the defendant out of the hell the defendant was living in, that the defendant made specific references to shooting and killing the victim, and the co-conspirator had access to a drug found in the victim's blood that had never been prescribed to the victim supported the convictions and denial of a directed verdict. Thornton v. State, 331 Ga. App. 191, 770 S.E.2d 279 (2015).

Inconsistent verdict not relevant when co-conspirator acquitted. — Trial court did not err by refusing to vacate the conviction for conspiracy to commit murder on the basis that the verdict was inconsistent or irreconcilable with the acquittal of a co-conspirator. Thornton v. State, 331 Ga. App. 191, 770 S.E.2d 279 (2015).

Sentence for two conspiracies harmless error. — Even if it was error to sentence the defendant on two conspiracy counts, the error was harmless because the sentence was within the legal limits for conviction of a single conspiracy. Dorsey v. State, 331 Ga. App. 486, 771 S.E.2d 167 (2015).

Theft by receiving stolen property. — Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's mis-statements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Conspiracy as underlying felony. — State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011).

Cited in Harper v. State, 292 Ga. 557, 738 S.E.2d 584 (2013).

What Constitutes Conspiracy

Conspiracy to commit armed robbery. — Evidence was sufficient to support the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a co-defendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the co-defendant

gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

Drug trafficking.

Evidence was sufficient to sustain the defendant's conviction for conspiracy to traffic methamphetamine over 400 grams in violation of O.C.G.A. §§ 16-4-8 and 16-13-31(e)(3) because an accomplice testified that the defendant supplied the accomplice with several pounds of methamphetamine, and that testimony was amply corroborated by other evidence in the record; the defendant's translator testified that the translator retrieved $15,000 from the accomplice as payment for fronted methamphetamine, police officers recovered $15,000 in cash from the translator upon leaving the accomplice's residence, and there were recorded conversations between the accomplice, the defendant, and the translator in which they discussed methamphetamine transactions. Melesa v. State, 314 Ga. App. 306, 724 S.E.2d 30 (2012).

Evidence was sufficient to establish that the defendant possessed marijuana with intent to distribute under a conspiracy theory because the defendant admitted to agreeing to drive a passenger to pick up the marijuana in exchange for the crack cocaine, which demonstrated an agreement between the defendant and the passenger; both the defendant and the passenger committed acts in furtherance of the agreement because the defendant drove the passenger to pick up the marijuana, and the passenger acquired the marijuana. Stokes v. State, 317 Ga. App. 435, 731 S.E.2d 118 (2012).

Because the state failed to prove the essential element of an agreement between the defendant and the occupants of a stash house in a drug conspiracy trial, since the only evidence was that a purchase of drugs was to take place, the defendant's conviction for conspiracy to traffic in cocaine under O.C.G.A. §§ 16-4-8 and 16-13-31(a)(1) was reversed. Griffin v. State, 294 Ga. 325, 751 S.E.2d 773 (2013).

Defendant's conviction for conspiracy to commit trafficking in cocaine was reversed because there was no evidence of any agreement between defendant and those operating the stash house, beyond a possible buy-sell agreement, and since the felony murder conviction was predicated on the conspiracy offense, that conviction required reversal as well. Griffin v. State, 2013 Ga. LEXIS 1009 (Nov. 25, 2013).

Jury Charge

Limiting instruction required. — Reversal of a conviction for conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), was required because the trial court failed to provide any limiting instruction informing jurors that the purchaser and the buyer in a drug transaction could not conspire together. Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011).

16-4-9. Withdrawal by coconspirator from agreement to commit crime.

JUDICIAL DECISIONS

Evidence insufficient to show defendant renounced and abandoned conspiracy. — Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and

possession of a firearm during the commission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

CHAPTER 5

CRIMES AGAINST THE PERSON

Cross references. — Exemption from classification of vicious dog for attacks during criminal pursuit, § 4-8-21.

ARTICLE 1

HOMICIDE

16-5-1. Murder; malice murder; felony murder; murder in the second degree.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.

(d) A person commits the offense of murder in the second degree when, in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice.

(e)(1) A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life.

(2) A person convicted of the offense of murder in the second degree shall be punished by imprisonment for not less than ten nor more than 30 years. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4254; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2009, p. 223, § 1/SB 13; Ga. L. 2014, p. 444, § 1-1/HB 271.)

The 2014 amendment, effective July 1, 2014, in subsection (c), deleted "also" following "A person" and inserted "or she"; added subsection (d); redesignated former subsection (d) as present subsection (e); and, in subsection (e), designated the existing provisions as paragraph (e)(1) and added paragraph (e)(2).

Law reviews. — For article, "State v. Jackson and the Explosion of Liability for Felony Murder," see 62 Mercer L. Rev. 1335 (2011). For article, "Killers Shouldn't Inherit from their Victims - Or Should They?," see 48 Ga. L. Rev. 145 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

Requirements for accepting guilty plea.

Defendant's conviction for malice murder, which was based upon a guilty plea, was reversed because the record did not show that the defendant was advised of the right against self-incrimination as required by Boykin; the state did not fulfill the state's duty to ensure that the defendant's guilty plea was constitutionally valid, the state apparently did not ensure that the defendant was advised of and had effective representation regarding the right to appeal the conviction, and the state did not litigate the merits of the defendant's guilty plea in the habeas corpus hearings since the record could have been expanded. Tyner v. State, 289 Ga. 592, 714 S.E.2d 577 (2011).

Evidence sufficient for malice murder and felony murder. — Evidence that the defendant was in the victim's home after a neighbor heard glass breaking and called 9-1-1, that a ribbon from the defendant's home was used to strangle the victim, that both the victim's and the defendant's DNA were on the ribbon, and that the victim's wedding ring was found in the defendant's pocket supported defendant's convictions for malice murder and felony murder. Muhammad v. State, 290 Ga. 880, 725 S.E.2d 302 (2012).

Double jeopardy did not bar retrial. — Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. Roesser v. State, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Evidence sufficient to convict. — Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary, as the evidence showed that the defendants were involved in a scheme to rob a person who they believed to be selling large amounts of marijuana from an apartment, that the defendants burst into the apartment brandishing guns, that one of the defendants fatally shot the victim, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005).

Defendant's murder conviction was supported by evidence showing that an eyewitness walked into a vacant house, saw the defendant and another man holding the crying victim at gunpoint and arguing with the victim over a drug debt, and then saw the defendant shoot the victim; it was the jury's role to determine whether the witness, a drug addict and a convicted felon, was credible. Flowers v. State, 291 Ga. 122, 728 S.E.2d 196 (2012).

Evidence was sufficient to support defendant's convictions for felony murder and armed robbery. One witness testified that the witness saw the defendant and the defendant's accomplice chasing the victim just prior to the shooting, while other witnesses testified that they saw the defendant and the defendant's accomplice fleeing the scene. Milford v. State, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. Platt v. State, 291 Ga. 631, 732 S.E.2d 75 (2012).

Jury could reasonably have inferred from the evidence that the defendant and the alleged shooter shared a criminal intent with respect to the shooting, as the two were in the car at the time of the shooting, stood at the front of the car together after the shooting, and eventually made their way to the same place. Powell v. State, 291 Ga. 743, 733 S.E.2d 294 (2012).

Cited in Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013); Springer v. State, No. A14A0598, 2014 Ga. App. LEXIS 368 (June 10, 2014); Freeman v. State, 328 Ga. App. 756, 760 S.E.2d 708 (2014).

Indictment

Predicate felony not required for malice murder. — Indictment was not defective for failing to charge a predicate felony because the charge against the defendant was for malice murder, not felony murder. Stephens v. State, 291 Ga. 837, 733 S.E.2d 266 (2012).

Indictment alleging shooting sufficiently alleged instrumentality used was firearm. — Defendant, who pled guilty to malice murder, O.C.G.A. § 16-5-1, was not entitled to an out-of-time appeal based on the indictment's failure to allege the instrumentality used; the indictment's allegations that the defendant caused the death of the victim by shooting the victim was sufficient to give notice that the defendant was charged with killing the victim with the use of a firearm. Brown v. State, 290 Ga. 321, 720 S.E.2d 617 (2012).

Intent and Malice

1. In General

Prior similar transaction evidence properly admitted to show intent and bent of mind.

Trial court's determination that the state met the requirements for admission of similar transaction evidence was not an abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant's bent of mind in using violence against a member of the defendant's family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011).

Sufficient evidence of malice.

Evidence was sufficient to support the defendant's conviction for malice murder because the defendant hit the victim with a baseball bat during the course of an argument over a drug transaction, and an incident that occurred when the defendant was a juvenile was properly admitted to show course of conduct and bent of mind. Jackson v. State, 291 Ga. 54, 727 S.E.2d 454 (2012).

Evidence that the defendant, who lived with the victims, and another were seen arguing with the victims immediately before the fire, a witness saw the defendant walk over to an area on the side of the residence where gas cans were discovered,

Intent and Malice (Cont'd)
1. In General (Cont'd)

witnesses observed the defendant throw something followed by the eruption of flames in the front portion of the house, and a crime scene investigator and arson investigation expert both concluded an accelerant had been used to intentionally set a fire was sufficient to support convictions for malice murder. Sharpe v. State, 291 Ga. 148, 728 S.E.2d 217 (2012).

Evidence that the child victim appeared healthy before being left alone with the defendant for several hours before the morning on which the victim was found dead and that defendant attempted to flee to Mexico was sufficient to support defendant's conviction for malice murder. Zamora v. State, 291 Ga. 512, 731 S.E.2d 658 (2012).

Defenses

Defendant could not argue justification as a defense, etc.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of "justifiable homicide" contained in the defendant's request was inconsistent with and had been superceded by the current statutory scheme for the affirmative offense of justification; the existence of "reasonable fears" is irrelevant to the consideration of voluntary manslaughter. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Accident not a defense to felony murder.

No reasonable probability existed that the outcome of the defendant's murder trial would have been different even if trial counsel presented an expert's testimony as to the defendant's borderline intellectual functioning and organic brain damage in the guilt/innocence phase of the original trial because the defendant's own testimony acknowledged that the defendant shot the vehicle occupant purposefully, as opposed to accidentally, in attempting to obtain a vehicle to escape, and even if the defendant had been convicted of only malice murder, instead of felony murder, the defendant would have still remained eligible for the death penalty. Humphrey v. Nance, 293 Ga. 189, 744 S.E.2d 706 (2013).

Evidence of Malice

Evidence sufficient to support conviction.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder based on aggravated assault, possession of a firearm during the commission of a crime, and use of a firearm by a convicted felon because the defendant admitted to purposefully putting a gun to the fearful victim's head and pulling the trigger. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder because numerous eyewitnesses saw the defendant fire a gun into a crowd striking the victim, shout expletives, and assert that the defendant was a killer; that the state did not produce certain evidence did not mean that the evidence presented was insufficient to allow a jury to find the defendant guilty of murder. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Possession of a stolen automobile was sufficient to support a felony murder conviction because the defendant's possession of the stolen car played a role in the defendant's decision to flee the police; the defendant could have believed that the defendant could escape in the stolen car, where the defendant could not have escaped on foot, and the decision to remain in the stolen car in order to flee created a

foreseeable risk of death. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant's waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Evidence that the defendant began the conflict, punching the victim shortly before the codefendant began to attack the victim, the defendant stood by and watched as the codefendant mercilessly continued the assault and encouraged the codefendant to "beat the victim's ass," and the defendant drove the codefendant away from the scene was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of murder. Simmons v. State, 289 Ga. 773, 716 S.E.2d 165 (2011).

Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. Jackson v. State, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

Malice murder conviction was supported by evidence that, inter alia, multi-

Evidence of Malice (Cont'd)

ple witnesses saw an individual matching the defendant's description in an argument prior to hearing multiple gunshots, the defendant admitted to a friend that the defendant shot the victim, phone records showed the defendant and the victim were communicating prior to the shooting and the defendant was in the vicinity of the hotel during that time, and the defendant was acting as a middle man for the victim's drug deal gone bad. Brown v. State, 291 Ga. 892, 734 S.E.2d 23 (2012).

Evidence was sufficient to convict the defendant of malice murder as the defendant admitted to firing two shots from the passenger's side of the car while leaning over the roof; a bullet hit the first victim in the neck, severing the first victim's spine and spinal cord; the first victim died several days later after being removed from life support; the first victim died as a result of the injuries inflicted by defendant as the first victim's injuries were such that the first victim could not live once life support systems were removed; and the defendant did not act in self defense. Browder v. State, 294 Ga. 188, 751 S.E.2d 354 (2013).

Evidence was sufficient to find the defendant guilty of malice murder because the defendant and the victim had a domestic dispute over the money that the defendant had borrowed from the victim; two days later, human body parts that were later identified as the victim's were found scattered around a secluded, wooded area near a house owned by the defendant; a coroner examined the remains and determined that the cause of death was homicide by unknown cause; the defendant never reported the victim missing; the defendant told conflicting stories about the victim's disappearance and the defendant's activities around that time; and the defendant towed the victim's car to a hotel parking lot and left it. Benson v. State, 294 Ga. 618, 754 S.E.2d 23 (2014).

State did more than rely on circumstantial evidence in convicting defendant. — There was sufficient evidence to support the defendant's murder conviction and the defendant's argument that the state relied solely on circumstantial evidence was belied by the admission of the defendant's statement to police that the defendant hit the victim with the ax handle. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281 (2013).

Felony Murder

1. In General

Multiple felony murder convictions, only one person killed.

Because the prohibition against double jeopardy does not permit a defendant to be punished on multiple murder counts for a single homicide, the superior court incorrectly sentenced the defendant on each felony murder count. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Circumstantial evidence was sufficient to sustain conviction in death of child.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of felony murder beyond a reasonable doubt because the victim did not have physical injuries when the victim's mother left the house on the day of the crime, and the defendant was the only person present during the hours in which the victim was physically injured; the pathologist testified that the location and severity of injuries was inconsistent with a mere fall from the bed. Whitaker v. State, 291 Ga. 139, 728 S.E.2d 209 (2012).

Evidence was sufficient to support conviction.

Evidence was sufficient to enable any rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and aggravated battery in connection with the death of a victim, the defendant's infant daughter, because the evidence showed that the defendant was the only person caring for the victim during the relevant time period and that the defendant caused the victim's death. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011).

In a felony murder case, testimony of eyewitnesses, cell phone exchanges between the cell phone in defendant's possession and that of the victim just minutes before the shooting, the identification of a

car used by the defendant as the car involved in the crime, and the defendant's statements about the shooting of the victim constituted sufficient evidence to enable a jury to find the defendant guilty beyond a reasonable doubt. Slaughter v. State, 289 Ga. 790, 716 S.E.2d 180 (2011).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence sufficient although cause of death undeterminable. — Evidence that the defendant made threatening remarks about the victim and then assaulted the victim in the defendant's trailer home, resulting in the victim becoming unconscious and then dying, along with evidence that the defendant admitted the murder, hid the body, and sold the victim's car was sufficient to find the defendant guilty of felony murder in spite of the fact that the medical cause of death was undeterminable due to the body's decomposition. Currier v. State, 294 Ga. 392, 754 S.E.2d 17 (2014).

Instruction on proximate cause in relationship to felony murder. — Trial court did not err in failing to instruct the jury on the law regarding proximate cause and its relationship to felony murder because the omission of additional language concerning proximate cause could not be considered a clear or obvious error under O.C.G.A. § 17-8-58; the jury was instructed that to find the defendant guilty of felony murder while in the commission of felony criminal attempt to possess cocaine, the jury had to find beyond a reasonable doubt that the felony was dangerous per se or, by the attendant circumstances in the case, created a foreseeable risk of death, and the jury was also instructed that for felony murder to be found, the jury had to find that, in the commission of the underlying felony, the defendant caused the death of another human being irrespective of malice. Sapp v. State, 290 Ga. 247, 719 S.E.2d 434 (2011).

2. Underlying Felony

Aggravated assault as underlying felony.

Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011).

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence that pointed to the cause of death as suffocation. Davis v. State, 290 Ga. 421,

Felony Murder (Cont'd)
2. Underlying Felony (Cont'd)

721 S.E.2d 886 (2012).

Robbery of gas station attendant. — Evidence that the defendant shot the victim, a service station attendant, while attempting to rob the service station with a revolver was sufficient to support the defendant's conviction for felony murder. Brockman v. State, 292 Ga. 707, 739 S.E.2d 332 (2013).

Participation in drug transaction meant no instruction on justification. — Based on the evidence supporting the defendant's participation in a felony drug transaction at the time of the fatal shooting of the victim, the trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that a person was not justified in using force in defense of self or others if the person was attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; the defendant affirmatively chose to engage in the potentially dangerous and violent criminal business of a felony drug deal before the fatal confrontation with the victim took place. Smith v. State, 290 Ga. 768, 723 S.E.2d 915 (2012).

Possession of controlled substance. — Because the defendant participated in a felony drug deal as the purchaser, the defendant was affirmatively choosing to engage in a dangerous and potentially violent criminal activity; thus, the defendant's criminal attempt to possess cocaine was dangerous and sufficiently connected to the murder so as to also serve as an underlying felony for the felony murder conviction. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Jury Instructions

Charge on transferred intent inappropriate. — Because the charge on transferred intent was not adjusted to the evidence, it was error for the trial court to so instruct the jury, and trial counsel performed deficiently by failing to object to the giving of that charge and the prosecutor's closing argument addressing the inapplicable principles of transferred intent; there was no evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical "innocent bystander" scenario in which the doctrine of transferred intent was applied, but in light of the overwhelming evidence of the defendant's guilt, it was highly probable that the charge did not contribute to the verdict. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

No error in recharging jury.

Trial court did not err by defining "malice aforethought" in response to a request from the jury for a recharge because the instruction was based on the pattern charge and was legally correct; given the correct and detailed instructions contained in the trial court's original charge to the jury, it was unlikely that the jury was confused by the recharge, which clearly indicated that premeditation was not an element of the crime. Dukes v. State, 290 Ga. 486, 722 S.E.2d 701 (2012).

Charge of mutual combat.

Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence reflected that the defendant and the victim mutually agreed to fight each other. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a).

Davidson v. State, 289 Ga. 194, 709 S.E.2d 814 (2011).

During the defendant's murder trial, the trial court did not err by denying the defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the same as acting in the heat of a sudden irresistible passion. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011).

Trial court did not give the jury an incomplete charge regarding the lesser included offense of voluntary manslaughter because the instruction did not prevent the jury from fully considering voluntary manslaughter and was adequate to inform the jury that before the jury could convict defendant of malice or felony murder, the jury had to first consider whether there was sufficient evidence of passion or provocation to support a conviction for voluntary manslaughter. Kendrick v. State, 290 Ga. 873, 725 S.E.2d 296 (2012).

Instruction on involuntary manslaughter not warranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Trial court did not err by denying the defendant's request to charge the jury on involuntary manslaughter as a lesser included offense of the felony murder charge because the defendant's admitted act of purposefully firing a gun at the victim constituted the felony offense of aggravated assault, not reckless conduct; the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Kendrick v. State, 290 Ga. 873, 725 S.E.2d 296 (2012).

Charge on party to crime proper.

When the defendant was convicted of murder, armed robbery, and related crimes in connection with the death of the victim, the defendant's counsel was not ineffective for failing to object to the trial court's jury instruction on parties to a crime, insofar as the indictment did not specifically charge the defendant as a party, because it was well-settled that the indictment need not specifically charge a criminal defendant as a party to the crime in order to permit a jury instruction on accomplice liability and authorize a conviction based thereon. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461 (2015).

Instruction on nexus between felony and death. — Trial court did not err in charging the jury on the nexus requirement between the felony and the death of the victim because the trial court gave the jurors the pattern charge on felony murder at least three times. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Charge of accident not warranted. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming arguendo that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

Self-defense instruction properly refused.

Trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that self-defense was inapplicable when the defendant was attempting to commit or was committing a felony because the defendant made an affirmative choice to engage in a danger-

Jury Instructions (Cont'd)

ous and potentially violent criminal activity when the defendant participated in a drug transaction. Davis v. State, 290 Ga. 757, 725 S.E.2d 280 (2012).

Instruction on vehicular homicide. — Trial court did not err in denying the defendant's request to instruct the jury on vehicular homicide as a lesser-included offense of felony murder because that lesser-included offense was not before the jury; before the case went to the jury, the trial court entered a directed verdict in the defendant's favor on the greater offense of felony murder and, thus, as the jury did not consider the greater offense, it could likewise not consider the lesser included offense for which the defendant had not been indicted. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Reckless conduct instruction unwarranted in felony murder trial.

Trial court did not err by failing to include reckless conduct on the verdict form as a lesser-included offense of felony murder because a separate reckless conduct option was not required to be on the verdict form since there was no evidence of reckless conduct other than that which directly related to the death of the victim, thus, the reckless conduct charge had to be in the context of involuntary manslaughter. Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014).

No error in failing to charge on mere presence.

In a murder prosecution, the trial court did not err when the court refused to give the defendant's requested charge on mere presence as there was no evidence that the defendant was merely present when the victim was shot; instead, the uncontroverted evidence showed that the defendant took an active part in the victim's death. Flowers v. State, 291 Ga. 122, 728 S.E.2d 196 (2012).

Instruction on inherent dangerousness not required. — Trial court did not err in refusing to instruct the jury regarding inherent dangerousness because an instruction on inherent dangerousness was not required. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Merger

Merger of manslaughter conviction.

Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous. Ingram v. State, 290 Ga. 500, 722 S.E.2d 714 (2012).

Merger of underlying felony.

Defendant was incorrectly sentenced on the aggravated assault charge which was the underlying offense for one of the felony murder charges. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Merger of malice murder and aggravated assault.

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Defendant's conviction on a second aggravated assault should have merged into the malice murder conviction because the victim sustained two shots to the arm and

one fatal shot to the back of the head, and the evidence did not authorize the finding of an additional "deliberate interval" between the second shot to the arm and the shot to the head; both were inflicted in close succession as the defendant confronted the victim. Ortiz v. State, 291 Ga. 3, 727 S.E.2d 103 (2012).

Two felony murder counts were vacated by operation of law given the malice murder verdict because both the malice murder and the aggravated assault counts were premised on the act of shooting the victim with a firearm, the assault verdict merged as a matter of fact with the malice murder verdict for sentencing purposes. The burglary count, O.C.G.A. § 16-7-1, did not merge with malice murder, O.C.G.A. § 16-5-1, because each crime required proof of an element that the other did not. Favors v. State, 770 S.E.2d 851, No. S14A1797, 2015 Ga. LEXIS 196 (2015).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. Hernandez v. State, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Merger with armed robbery count.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Underlying conspiracy conviction merged into felony murder conviction. — Defendant's separate conviction for conspiracy was vacated because the conspiracy conviction was the underlying felony that formed the basis for the defendant's felony murder conviction; because the underlying conspiracy merged into the felony murder conviction, the trial court erred in entering a separate judgment of conviction and sentence on the jury's verdict finding the defendant guilty of conspiracy. Higuera-Hernandez v. State, 289 Ga. 553, 714 S.E.2d 236 (2011).

Conviction for apprehending criminal and malice murder. — Defendant's conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

Sentence

Sentence of life in prison without parole did not violate due process. — O.C.G.A. § 16-5-1(d) was not unconstitutional as applied to the defendant due to an alleged lack of a mechanism or guidance for the imposition of a sentence or the provision of mitigating evidence because, while no individual determination was required to sentence the defendant in a non-death penalty case, the defendant was allowed to submit mitigating evidence at sentencing, so the defendant's due process rights were not violated. Williams v. State, 291 Ga. 19, 727 S.E.2d 95 (2012).

Sentence of youth not excessive. — Appellant's sentence of two consecutive terms of life imprisonment plus 85 years was not cruel and unusual punishment, despite being 17 years old at the time of the crimes, because the trial court followed the guidance offered in case law and explicitly considered the appellant's relatively young age and explained that the court balanced the appellant's youth against the vicious, mean, violent behavior and the adult conduct engaged in, which included the murder of not one but two innocent bystanders. Jones v. State, 296 Ga. 663, 769 S.E.2d 901 (2015).

Sentence not excessive.

Defendant's sentence of life without parole did not amount to cruel and unusual punishment. Foster v. State, 294 Ga. 383, 754 S.E.2d 33 (2014).

Defendant's age at sentencing did not make sentence excessive. — Fact that the defendant was 22 years old at the time the life sentence was imposed did not render the defendant's life sentence cruel and unusual punishment. Jessie v. State,

Sentence (Cont'd)

294 Ga. 375, 754 S.E.2d 46 (2014).

Life without parole could not be imposed upon conviction of malice murder.

Although the prosecutor and the trial court during the plea hearing erroneously told the defendant that the defendant would be subject to probation, the written sentence signed by the judge and the defendant and filed with the clerk showed that the trial court imposed a sentence of life with parole, not probation. Bell v. State, 294 Ga. 5, 749 S.E.2d 672 (2013).

Two life sentences for murder of single victim.

Defendant's three additional life sentences for felony murder were illegal and could not stand because the trial court erred in failing to sentence the defendant only on the two malice murder counts; the convictions for felony murder were simply surplusage, which should properly have been disposed of by the trial court's sentence of only one life sentence for each of the malice murder counts. Brown v. State, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Juvenile's sentence of life without parole was not cruel and unusual punishment. — U.S. Supreme Court's decisions in Roper v. Simmons, Graham v. Florida, and Miller v. Alabama did not demand the conclusion that a sentencing court was categorically barred from sentencing a juvenile in a homicide case to life imprisonment without the possibility of parole, plus 70 years; in this case, O.C.G.A. § 16-5-1(e)(1) allowed the sentencing court to consider the defendant's youth and impulsiveness. Bun v. State, 296 Ga. 549, 769 S.E.2d 381 (2015).

Sentence for felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. Sapp v. State, 290 Ga. 247, 719 S.E.2d 434 (2011).

Sentence for felony murder and involuntary manslaughter prohibited. — Because the prohibition against double jeopardy does not permit a defendant to be punished on multiple murder counts for a single homicide, it was error for the trial court to sentence the defendant for involuntary manslaughter in light of the conviction for felony murder as there was only one homicide. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Sentence of life in prison without parole did not require jury determination. — Because O.C.G.A. § 16-5-1 was amended to add life imprisonment without the possibility of parole as an authorized punishment for murder without regard to whether the state seeks the death penalty, life without parole fell within the statutory range, and counsel was not ineffective for failing to object to the defendant's sentence despite the absence of any jury determination that such punishment was appropriate. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461 (2015).

Application

1. In General

Circumstantial evidence.

Evidence, although circumstantial, was sufficient for a rational trier of fact to reject the defense theory that the victim's death was a suicide and to find the defendant guilty of malice murder beyond a reasonable doubt; the circumstantial evidence was substantial, including not only the nature of the victim's gunshot wound, but also the defendant's motive to harm the victim, and the defendant's prolonged cover-up and conflicting accounts of the victim's death. Walden v. State, 289 Ga. 845, 717 S.E.2d 159 (2011).

Although circumstantial, the evidence was sufficient to convict the defendant of murder, armed robbery, and related crimes in connection with the death of the victim because the defendant was identified by a witness as the person the witness saw coming upstairs from the victim's apartment just before the witness discov-

ered the crimes; the defendant's fingerprints were found on the car used in the crimes; and the defendant's own statements, both via text message and in person, corroborated the defendant's participation in the murder and robbery. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461 (2015).

Medical examiner unable to pinpoint asphyxiation method. — Although the medical examiner was unable to explain the precise mechanism by which the adult victim was asphyxiated, the state nevertheless offered evidence sufficient to prove that the defendant was the cause of asphyxiation and that the defendant caused the adult victim's death unlawfully and with malice, which was enough to sustain the conviction for the murder of the adult victim. Walker v. State, 296 Ga. 161, 766 S.E.2d 28 (2014).

Evidence sufficient for murder conviction.

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder and possession of a firearm during the commission of a crime because although there were defense witnesses who testified that someone else, and not defendant, was the actual shooter, and there were inconsistencies and contradictions in the testimony of the state's witnesses, the jury, after considering all of the evidence, chose to believe the state's version and that defendant's witnesses were not credible. Martinez v. State, 289 Ga. 160, 709 S.E.2d 797 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence presented at trial was sufficient to authorize a rational jury to reject the defendant's justification defense and find the defendant guilty of murder beyond a reasonable doubt because the defendant was involved in a pool hall fight, drew a pistol, and opened fire, killing the victim. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011).

Evidence was sufficient to support convictions for malice murder because: (1) before the decedent's death, the decedent told a friend that the decedent had been beaten in a fight by one of the defendants; (2) the other defendant placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (3) the truck was destroyed in an arson fire near an apartment complex where the defendants were staying with relatives; (4) the decedent's body was found in the bed of the truck; (5) the decedent had been dead for days before the fire; and (6) personal belongings of the decedent were found in the possession of the defendants. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder beyond a reasonable doubt because police found the victim beaten, stabbed, and strangled in the living room, and blood evidence collected at the scene later connected the defendant to the crime. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

Evidence was sufficient to authorize a rational trier of fact to find the defendant

Application (Cont'd)
1. In General (Cont'd)

guilty of malice murder and possession of a firearm during the commission of a felony because the state's case rested on direct as well as circumstantial evidence; the direct evidence included testimony by an eyewitness that the defendant was the shooter, testimony by another witness who overheard the defendant discussing the shooting and laughing at the fact that the defendant killed the victim in front of the victim's children, and the confession of the defendant to police officers that the defendant shot the victim. Rockholt v. State, 291 Ga. 85, 727 S.E.2d 492 (2012).

Evidence supported the defendant's convictions of felony murder during the commission of aggravated assault, aggravated assault, possession of marijuana, and possession of a firearm during the commission of a crime since: (1) after smoking marijuana, the defendant attacked the victim, pulled a gun from the defendant's pocket, and shot the victim four times; (2) the victim told the police that the defendant did it; (3) the victim died; (4) a knife was found near the victim, the defendant had a stab wound, and the defendant claimed self-defense; and (5) witnesses one and two saw the defendant pull the gun but did not see the victim with a knife. Hill v. State, 291 Ga. 160, 728 S.E.2d 225 (2012).

State's physical evidence, including the victim's blood on the defendant's shirt, the defendant's unexplained possession of the victim's truck, watch, and other personal property, and the fact that the defendant was seen near the victim's residence and farm not long before the crimes were committed, supported the defendant's convictions for malice murder and armed robbery. Blevins v. State, 291 Ga. 814, 733 S.E.2d 744 (2012).

When the medical examiner determined that, although the autopsy revealed other medical conditions, the cause of the victim's death was delayed complications from the blunt force trauma to the victim's head, the evidence was sufficient to establish that the defendant's actions were the cause of the victim's subsequent death. Clarke v. State, 292 Ga. 305, 737 S.E.2d 575 (2013).

Evidence that the victim's brother told an officer the brother thought the victim was dead because the defendant, the father, had killed the victim; that the defendant admitted to family members, while meeting in an interview room at the police station, that the defendant killed the victim; and that the victim had been strangled to death was sufficient to support the defendant's conviction for malice murder. Rashid v. State, 292 Ga. 414, 737 S.E.2d 692 (2013).

Defendant's claim that the evidence was insufficient to support the convictions for malice murder and possession of a firearm during the commission of a felony because the state was unable to present evidence to disprove the earlier incident between the defendant and the victim or disprove that the defendant acted in self-defense when the defendant shot the victim failed because testimony from eyewitnesses to the shooting and forensic evidence belied the claim that the defendant acted in self-defense. Among other things, the defendant testified the defendant shot the victim because the victim pulled out a knife, claiming the defendant saw the blade; however, two closed pocket knives were found. Hoffler v. State, 292 Ga. 537, 739 S.E.2d 362 (2013).

Testimony from two witnesses that the witnesses recognized the defendant from the defendant's distinctive walk and that one also recognized the defendant from the defendant's posture, shoulders, complexion, and nose; the fact that a dark fiber like one that could have been from the shooter's wig was found in the defendant's truck; and the defendant's admission to an inmate that the defendant shot the victim supported the defendant's convictions for malice murder and possession of a firearm during the commission of a felony. Hayes v. State, 292 Ga. 506, 739 S.E.2d 313 (2013).

Evidence that the defendant's wallet was found on the victim's kitchen table, a plastic grocery bag containing the defendant's blood stained clothes were discovered, and DNA testing showed that the blood on the defendant's windbreaker came from the victim and the blood spatter was consistent with the wearer having struck the victim, was sufficient to sup-

port the defendant's convictions for malice murder and robbery. Hall v. State, 292 Ga. 701, 743 S.E.2d 6 (2013).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's hand as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support the defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Doctor's prescription of controlled substances causing death. — Felony murder conviction was supported by evidence that the defendant illegally provided controlled substances through prescriptions, a dangerous felony, and that the victim's death was a foreseeable result within the meaning of the felony murder statute. Chua v. State, 289 Ga. 220, 710 S.E.2d 540 (2011).

Felony murder predicated on drug transaction. — Defendant was properly convicted of felony murder predicated on a drug transaction and attempted violation of the Georgia Controlled Substance Act (VGCSA), O.C.G.A. § 16-13-20 et seq., because there was a sufficient nexus between the VGCSA and the victim's death to show that the defendant's participation in the drug transaction was the proximate cause of the victim's death because four men met for a drug transaction and something went wrong; during the course of the events, the defendant shot and killed the victim; thus, the felony the defendant committed directly and materially contributed to the happening of a subsequent accruing immediate cause of the death. Davis v. State, 290 Ga. 757, 725 S.E.2d 280 (2012).

Rule against mutually exclusive verdicts did not apply.

Guilty verdicts for involuntary manslaughter and as a party to the felony murder of the victim while in the commission of aggravated assault of the victim with a blunt object were not mutually exclusive as the verdicts were supported by evidence of separate acts, committed at separate moments during the night the victim was killed. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Verdicts for malice murder and other intent crimes were mutually exclusive of reckless conduct verdict. — Appellant's convictions for malice murder, felony murder, aggravated assault, battery, and simple battery were reversed because the verdicts were mutually exclusive of the verdict on reckless conduct as the former required the jury to find criminal intent and the verdict on reckless conduct required only a finding of criminal negligence and all the verdicts involved the same act by the accused as to the same victim at the same instance of time. Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

2. Children as Victims

Evidence insufficient for murder of baby. — Defendant's conviction for felony murder of the baby was not supported by sufficient evidence as there was no proof that the murder of the adult victim proximately caused the baby's death. Walker v. State, 296 Ga. 161, 766 S.E.2d 28 (2014).

Evidence sufficient for murder of infant child.

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

Cruelty to child as underlying felony in felony murder.

Evidence was sufficient to enable a jury

Application (Cont'd)
2. Children as Victims (Cont'd)

to find the defendant guilty of murder, felony murder, cruelty to children, and aggravated battery for the death of the defendant's baby because the defendant admitted to a number of actions consistent with the fatal injuries suffered by the baby; the actions the defendant took against the baby and the resulting injuries were reflected in the autopsy findings. Stokes v. State, 289 Ga. 702, 715 S.E.2d 81 (2011).

Death of 18 month old child. — Evidence was sufficient to convict the defendant of, inter alia, four counts of felony murder, one count of involuntary manslaughter, and one count of aggravated assault in connection with the abuse and resulting death of the 18-month-old victim because a forensic child pathologist reviewed the findings of the victim's autopsy and opined that the pooling of blood on the front of the victim's body was consistent with the victim's belly being pressed against an object like the mattress or pad of a crib; and the defendant saw the boyfriend spank the children on the night of the victim's murder and watched as the boyfriend pushed the victim's face into the crib. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Death of infant from shaking. — The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

3. The Elderly as Victims

Evidence sufficient for killing elderly victim.

Evidence was presented to the jury that elderly and bedridden patients such as the 82 year old victim often die as a result of pneumonia or infections that the patients develop during treatment, such as infections from a dislodged feeding tube. While the defendant blames the victim's caregivers for failing to notice in a timely manner that the victim's feeding tube had become dislodged, the evidence shows that it was because of the brain injuries inflicted upon the victim by the defendant that a feeding tube was required and that the victim was unable to inform anyone when the tube became dislodged. As a result, the evidence is sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder. Dodson v. State, 292 Ga. 790, 741 S.E.2d 639 (2013).

4. Spouses or Lovers as Victims

Evidence sufficient for malice murder of spouse.

Evidence that the victim, the defendant's wife, was killed in the victim's bed, the defendant reported the shooting but was not at the house when police arrived, the gun was found under the pillow next to the victim, a crime scene technician testified that the shooter folded a pillow around the victim's head and shot the victim through the pillow, and testimony that the defendant was physically and emotionally abusive toward the victim was sufficient to support the defendant's conviction for malice murder. Smith v. State, 292 Ga. 620, 740 S.E.2d 158 (2013).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-2. Voluntary manslaughter.

JUDICIAL DECISIONS

Analysis

General Consideration

Merger of conviction into felony murder.

Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous. Ingram v. State, 290 Ga. 500, 722 S.E.2d 714 (2012).

Double jeopardy did not bar retrial. — Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. Roesser v. State, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Cited in Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011); Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Provocation

Adulterous conduct deemed sufficient provocation.

In the defendant's murder trial, the trial court erred in excluding evidence that the defendant's spouse was having two extramarital affairs; evidence that the spouse was having the affairs was relevant to prove that the spouse told the defendant about the affairs at the time of the murder and such a conversation might be sufficient provocation to reduce the crime to voluntary manslaughter under O.C.G.A. § 16-5-2(a). Lynn v. State, 296 Ga. 109, 765 S.E.2d 322 (2014).

Mutual Combat

No charge on mutual combat authorized when defendant testified to acting in self-defense. — In the defendant's trial for murder of another inmate, no evidence warranted instructions on voluntary manslaughter and mutual combat because the defendant testified the defendant acted in self-defense in the fight and did not intend to kill the victim, while eyewitnesses described the defendant as chasing the victim. Ruffin v. State, 296 Ga. 262, 765 S.E.2d 913 (2014).

Defenses

Self-defense.

Evidence was sufficient to support the defendant's conviction for voluntary manslaughter because the defendant's testimony that the initial shot to the victim's head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been

Defenses (Cont'd)

shot in the head, from the victim's assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant's claim of self-defense, given the number of gunshots fired. Davis v. State, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims had engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self defense, when the defendant shot an unarmed victim. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Jury Charge

At least some evidence must support charge of voluntary manslaughter.

Trial court did not err by refusing to give a jury charge on voluntary manslaughter because there was no evidence that following arrival the appellant was taunted by the victim or subjected to any conduct that would excite the passions of a reasonable person; rather, the evidence showed that the prior altercation and fighting involving the appellant's relatives occurred some 30 or 40 minutes before the appellant arrived at the apartment complex. Smith v. State, 296 Ga. 731, 770 S.E.2d 610 (2015).

Instruction requiring jury to consider malice murder, felony murder, and voluntary manslaughter simultaneously. — Defendant failed to establish plain error in the trial court's charge pursuant to O.C.G.A. § 17-8-58 because the trial court clearly instructed the jury that before it was authorized to return a verdict of guilty of malice murder or felony murder, it had to first determine whether mitigating circumstances would cause the offense to be reduced to voluntary manslaughter; the structure of the actual verdict form made it clear that, as to each victim, the jury was required to consider malice murder, felony murder, and voluntary manslaughter simultaneously. Ortiz v. State, 291 Ga. 3, 727 S.E.2d 103 (2012).

Instruction on when exculpatory matter in defendant's statement cannot be rejected unwarranted. — Trial court did not err when the court declined to give the defendant's requested charge as to when a jury could not reject exculpatory matter in the defendant's statement because anything in the defendant's statement that could support a defense of voluntary manslaughter was contradicted by other evidence that the defendant's attack on the victim was of significant length and involved a number of different deliberate and cruel actions; that the defendant's mind was changed about whether and how to kill the victim; and that the victim sustained numerous injuries. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014).

Instruction that words alone did not constitute sufficient provocation, etc.

Trial court's charge that provocation by words alone would not justify manslaughter was not erroneous because it was implicit in the statutory voluntary manslaughter instruction that was given pursuant to the defendant's request; and it was consistent with the defense theory that the defendant was provoked by the conduct of the victim, the defendant's girlfriend, with the customer from the dance club where the victim worked and not the victim's words alone. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014).

Evidence held sufficient to authorize a charge on voluntary manslaughter.

Trial court erred in failing to instruct the jury on the lesser-included offense of voluntary manslaughter under O.C.G.A. § 16-5-2(a) and in ruling that defendant could not introduce evidence relevant un-

der former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-401 et seq.) based on the cumulative effect of the victim's alleged molestation of defendant's niece, defendant's discovery thereof, and the victim's taunt. Scott v. State, 291 Ga. 156, 728 S.E.2d 238 (2012).

Failure to instruct on voluntary manslaughter not error.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). Davidson v. State, 289 Ga. 194, 709 S.E.2d 814 (2011).

Trial court's failure to instruct a jury on the lesser included offense of voluntary manslaughter was not error since there was no evidence that the defendant acted in response to a sudden, violent passion resulting from serious provocation. The victim's death was either the cold, calculated method by which defendant intended to profit or, at best, the unfortunate result of resisting an armed robbery. McNeal v. State, 289 Ga. 711, 715 S.E.2d 95 (2011).

During the defendant's murder trial, the trial court did not err by denying the defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the same as acting in the heat of a sudden irresistible passion. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011).

Defendant was not entitled to an instruction on voluntary manslaughter because, while the testimony provided some evidence that the defendant might have acted in self-defense, there was no evidence that the defendant acted passionately. Allen v. State, 290 Ga. 743, 723 S.E.2d 684 (2012).

Trial court did not give the jury an incomplete charge regarding the lesser included offense of voluntary manslaughter because the instruction did not prevent the jury from fully considering voluntary manslaughter and was adequate to inform the jury that, before the jury could convict defendant of malice or felony murder, the jury had to first consider whether there was sufficient evidence of passion or provocation to support a conviction for voluntary manslaughter. Kendrick v. State, 290 Ga. 873, 725 S.E.2d 296 (2012).

Habeas court erred in granting a petitioner relief on the ground that the trial court erred when the court refused to instruct the jury on the offense of voluntary manslaughter under O.C.G.A. § 16-5-2(a) when appellate counsel failed to present the question on direct appeal, and neither the petitioner's nor the state's evidence tended to show a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. Humphrey v. Lewis, 291 Ga. 202, 728 S.E.2d 603 (2012).

In a case in which the defendant was convicted of felony murder and armed robbery, the trial court did not err by failing to charge the jury on the lesser included offense of voluntary manslaughter when the defendant took the victim's bicycle at gunpoint, and when the defendant saw the victim on the telephone, the defendant began chasing the victim and shot the victim in the throat; this evidence did not show the sudden, violent, and irresistible passion required to warrant an instruction on voluntary manslaughter. Milford v. State, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence did not support a jury instruction on voluntary manslaughter as the evidence showed, at most, that the defendant and the victim, the defendant's wife, argued about the defendant's infidelity and that the defendant choked the victim the next morning. It appeared that a few hours had passed between the argument

Jury Charge (Cont'd)

and the killing. Merritt v. State, 292 Ga. 327, 737 S.E.2d 673 (2013).

Trial court did not err in refusing to instruct the jury on voluntary manslaughter as a lesser included offense of malice murder because there was no serious provocation that would have elicited a violent and irresistible passion in a reasonable person. Campbell v. State, 292 Ga. 766, 740 S.E.2d 115 (2013).

In an action charging the defendant with felony murder, the defendant was not entitled to a jury instruction on voluntary manslaughter and there was no evidence of provocative conduct by the victim sufficient to warrant such an instruction. Brockman v. State, 292 Ga. 707, 739 S.E.2d 332 (2013).

Defendant was not entitled to a jury instruction on voluntary manslaughter as there was no evidence of irresistible passion of provocation or any factual basis to support a finding of voluntary manslaughter given that the defendant shot into an unsuspecting crowd of strangers. Foster v. State, 294 Ga. 383, 754 S.E.2d 33 (2014).

Trial court's failure to give a jury instruction on voluntary manslaughter was not error, because the mere fact that the defendant and the victim argued before the defendant left the house, retrieved an axe, and began the attack did not support such an instruction, and there was no evidence that the victim had recently engaged in sexual relations with the victim's out-of-state spouse or taunted the defendant with such conduct. Brown v. State, 294 Ga. 677, 755 S.E.2d 699 (2014).

Trial court's failure to charge on voluntary manslaughter was not plain error because there was no evidence that the other gang members had guns or shot at the appellant and the only shell casings at the scene were found where appellant was seen firing a gun, plus, even if words were exchanged prior to the event, as a matter of law, angry statements alone ordinarily did not amount to serious provocation within the meaning of a voluntary manslaughter charge. Jones v. State, 296 Ga. 663, 769 S.E.2d 901 (2015).

In defendant's trial for the murder of the defendant's estranged spouse and housemate, the trial court properly declined to instruct the jury on voluntary manslaughter because, although the defendant and the spouse had ongoing difficulties, there was no evidence of any specific provocation at the time of the murders to generate a sudden and irresistible passion. Russell v. State, 295 Ga. 899, 764 S.E.2d 812 (2014).

Evidence did not support a jury instruction on involuntary manslaughter as there was no evidence that the defendant killed the victim as a result of a sudden, violent, and irresistible passion or that the victims provoked the defendant, who shot unarmed victims from behind and chased the victims as the victims tried to flee. Moore v. State, 295 Ga. 709, 763 S.E.2d 670 (2014).

Instruction on involuntary manslaughter unwarranted.

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. Davis v. State, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

At defendant's trial for the murder of the defendant's spouse, an instruction on voluntary manslaughter was not required because words alone generally were not sufficient provocation, and several hours had passed between the spouse's confrontation and the shooting. Francis v. State, 296 Ga. 190, 766 S.E.2d 52 (2014).

Instruction on voluntary manslaughter unwarranted.

Evidence did not support a charge on voluntary manslaughter as the defendant was admittedly upset after the defendant's dog died in the victim's care, but

rather than acting on the news suddenly, the defendant sat around for a day drinking and making threats and, thus, the shooting was more akin to an act of revenge than an act of sudden, violent, and irresistible passion. Brett v. State, 294 Ga. 30, 751 S.E.2d 59 (2013).

Voluntary manslaughter charge not erroneous. — Trial court did not err in charging the jury that words alone were insufficient provocation to support a verdict of voluntary manslaughter and that the jury had to find that words were accompanied by menaces in order to sustain a manslaughter verdict because there was no evidence that the victim recounted, taunted, or bragged about sexual involvement with other men; therefore, the circumstances regarding the victim's alleged adulterous conduct did not suffice to replace the requirement of menaces. Davis v. State, 290 Ga. 421, 721 S.E.2d 886 (2012).

Whether evidence showed voluntary manslaughter and not murder is question for jury. — Evidence was sufficient to convict the defendant of malice murder as well as the felony murder counts of the indictment because a witness saw the victim's empty hands in the air just as the defendant shot the victim; the jury was not required to find that the defendant acted in self-defense; and, although the defendant argued that the evidence showed that the defendant feared for the defendant's safety, and that such fear could be a circumstance sufficient to show voluntary manslaughter even if the jury rejected the defendant's claim of self-defense, the jury was instructed on voluntary manslaughter, and whether the evidence showed only voluntary manslaughter and not murder was a question for the jury. Dupree v. State, 295 Ga. 655, 763 S.E.2d 459 (2014).

Application

Reducing murder to voluntary manslaughter based on victim's alcohol use. — With regard to the defendant's murder conviction for killing his wife, the trial court properly excluded evidence of the victim's alcohol use to show the provocation necessary to reduce murder to voluntary manslaughter because the defendant failed to present any evidence of the effect the victim's alcohol consumption had on her behavior on the day she was stabbed. Dunn v. State, 292 Ga. 359, 736 S.E.2d 392 (2013).

Voluntary manslaughter as lesser included offense of felony murder. — Verdict was not legally repugnant and the defendant's acquittal for voluntary manslaughter as a lesser included offense of malice murder did not bar the defendant's conviction for voluntary manslaughter as a lesser included offense of felony murder as the jury could have determined that the defendant fired at the codefendants as the result of sudden passion resulting from the codefendants' provocative act of shooting at the defendant and that the defendant was not guilty of malice murder because the defendant did not intend to kill the victim. Carter v. State, 331 Ga. App. 212, 770 S.E.2d 295 (2015).

Evidence sufficient for voluntary manslaughter conviction.

Evidence was sufficient to show beyond a reasonable doubt that the defendant was guilty of voluntary manslaughter in that the defendant shot and killed the victim out of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person under O.C.G.A. § 16-5-2(a). Davis v. State, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Although a witness testified at trial that the defendant fired the first shot and that statement was contradicted by the statement the witness gave to police shortly after the incident, in which the witness stated that the victim attempted to sneak up on the defendant and fired the first shot at the defendant, who then fired back, evidence that the defendant pursued the victim and then laid in wait for the victim supported a voluntary manslaughter conviction. Mingledolph v. State, 324 Ga. App. 157, 749 S.E.2d 757 (2013).

Witness's testimony that the witness and the defendant had been smoking crack cocaine down the street from the victim's apartment, the defendant left the house to get more drugs, and the defendant returned agitated and told the witness an old man stole the defendant's

Application (Cont'd)

crack but the defendant "took care of him," and testimony the victim went head first through a window after being burned supported convictions for voluntary manslaughter and aggravated assault. Haymer v. State, 323 Ga. App. 874, 747 S.E.2d 512 (2013).

Evidence insufficient to support convictions. — Defendant was entitled to reversal of the convictions for voluntary manslaughter because there was no evidence of sudden provocation by the baby, nor was there evidence to support the inference that the defendant was so angry at the baby's father that the defendant acted out of an irresistible passion and killed the baby, permitting conviction based on the doctrine of transferred intent. Graham v. State, 320 Ga. App. 714, 740 S.E.2d 649 (2013).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-3. Involuntary manslaughter.

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTIONS
APPLICATION GENERALLY

Jury Instructions

Instruction on involuntary manslaughter unwarranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. Davis v. State, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Trial court did not err by denying the defendant's request to charge the jury on involuntary manslaughter as a lesser included offense of the felony murder charge because the defendant's admitted act of purposefully firing a gun at the victim constituted the felony offense of aggravated assault, not reckless conduct; the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Kendrick v. State, 290 Ga. 873, 725 S.E.2d 296 (2012).

In an action charging the defendant with felony murder while in the commission of aggravated battery, felony murder while in the commission of aggravated assault, felony murder while in the commission of cruelty to a child, two counts of aggravated battery, aggravated assault, cruelty to a child, and battery, the defendant was not entitled to a jury instruction on involuntary manslaughter as there was no evidence to find that the defendant committed the misdemeanor of reckless conduct or failure to seek medical care. Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013).

Evidence did not support a charge for involuntary manslaughter as the defendant's act of firing from the car clearly established the felony of aggravated assault and not mere reckless conduct. Browder v. State, 294 Ga. 188, 751 S.E.2d 354 (2013).

Trial counsel was not ineffective for failing to argue for involuntary manslaughter as a lesser included offense of murder, pursuant to O.C.G.A. § 16-5-3(a), because the jury would have had to believe that the use of a loaded gun to strike the victim was not used as a deadly weapon, and the theory of the defense was that the defendant was not present. Wells v. State, 295 Ga. 161, 758 S.E.2d 598 (2014).

Instruction on reckless conduct unwarranted. — Trial court did not err by failing to include reckless conduct on the verdict form as a lesser-included offense of felony murder because a separate reckless conduct option was not required to be on the verdict form since there was no evidence of reckless conduct other than that which directly related to the death of the victim; thus, the reckless conduct charge had to be in the context of involuntary manslaughter. Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014).

Instruction on involuntary manslaughter unwarranted where self-defense asserted.

Defendant's requested charge on misdemeanor involuntary manslaughter was not justified by the defendant's statement to police that the victim attacked the defendant and that the defendant accidentally strangled the victim in an attempt to restrain the victim because one who sought to justify homicide as having been committed in self-defense was not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792 (2014).

Failure to charge jury was not prejudicial.

While the trial court erred in rejecting the defendant's written request to charge the jury on unlawful act involuntary manslaughter, pursuant to O.C.G.A. § 16-5-3(a), as a lesser included offense of the crime of murder, the error was harmless because there was overwhelming evidence inconsistent with the defendant's version of events, but supportive of the jury's finding the defendant guilty of malice murder. Rogers v. State, 289 Ga. 675, 715 S.E.2d 68 (2011).

Failure to charge on manslaughter not erroneous.

Trial court did not err in refusing to give the defendant's two requested jury charges on involuntary manslaughter because the defendant's own testimony that the gun the defendant was holding made contact with the victim, and when the gun did the defendant gave a push and told the victim to get back, revealed that the defendant's purpose in pointing the weapon was to place the victim in apprehension of immediate violent injury so that there was no basis for a charge on involuntary manslaughter. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Application Generally

Evidence was sufficient to sustain defendant's conviction, etc.

Evidence was sufficient to convict the defendant of, inter alia, four counts of felony murder, one count of involuntary manslaughter, and one count of aggravated assault in connection with the abuse and resulting death of the 18-month-old victim because a forensic child pathologist reviewed the findings of the victim's autopsy and opined that the pooling of blood on the front of the victim's body was consistent with the victim's belly being pressed against an object like the mattress or pad of a crib; and the defen-

Application Generally (Cont'd)

dant saw the boyfriend spank the children on the night of the victim's murder and watched as the boyfriend pushed the victim's face into the crib. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Verdicts of involuntary manslaughter and felony murder not mutually exclusive.

Guilty verdicts for involuntary manslaughter and as a party to the felony murder of the victim while in the commission of aggravated assault of the victim with a blunt object were not mutually exclusive as the verdicts were supported by evidence of separate acts, committed at separate moments during the night the victim was killed. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Guilty verdicts for involuntary manslaughter and as a party to the felony murder of the victim while in the commission of cruelty to children in the first degree by application of force against the victim were not mutually exclusive as the defendant aided the defendant's boyfriend, by omission or commission, to perpetrate numerous acts of abuse against the victim at different moments during the time preceding the victim's death. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Sentence for felony murder and involuntary manslaughter prohibited. — Because the prohibition against double jeopardy does not permit a defendant to be punished on multiple murder counts for a single homicide, it was error for the trial court to sentence the defendant for involuntary manslaughter in light of the convictions for felony murder as there was only one homicide. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-5. Assisted suicide; notification of licensing board regarding violation.

(a) As used in this Code section, the term:

(1) "Assists" means the act of physically helping or physically providing the means.

(2) "Health care provider" means any person licensed, certified, or registered under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43.

(3) "Suicide" means the intentional and willful termination of one's own life.

(b) Any person with actual knowledge that a person intends to commit suicide who knowingly and willfully assists such person in the commission of such person's suicide shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

(c) The provisions of this Code section shall not apply to:

(1) Pursuant to a patient's consent, any person prescribing, dispensing, or administering medications or medical procedures when

such actions are calculated or intended to relieve or prevent such patient's pain or discomfort but are not calculated or intended to cause such patient's death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(2) Pursuant to a patient's consent, any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration;

(3) Any person prescribing, dispensing, or administering medications or medical procedures pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, a Physician Orders for Life-Sustaining Treatment form pursuant to Code Section 31-1-14, or a consent pursuant to Code Section 29-4-18 or 31-9-2 when such actions are calculated or intended to relieve or prevent a patient's pain or discomfort but are not calculated or intended to cause such patient's death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(4) Any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, a Physician Orders for Life-Sustaining Treatment form pursuant to Code Section 31-1-14, a consent pursuant to Code Section 29-4-18 or 31-9-2, or a written order not to resuscitate; or

(5) Any person advocating on behalf of a patient in accordance with this subsection.

(d) Within ten days of a conviction, a health care provider who is convicted of violating this Code section shall notify in writing the applicable licensing board for his or her licensure, certification, registration, or other authorization to conduct such health care provider's occupation. Upon being notified and notwithstanding any law, rule, or regulation to the contrary, the appropriate licensing board shall revoke the license, certification, registration, or other authorization to conduct such health care provider's occupation. (Code 1981, § 16-5-5, enacted by Ga. L. 2012, p. 637, § 1/HB 1114; Ga. L. 2015, p. 305, § 3/SB 109.)

Effective date. — This Code section became effective May 1, 2012.

The 2015 amendment, effective July 1, 2015, inserted "a Physician Orders for Life-Sustaining Treatment form pursuant to Code Section 31-1-14," near the middle of paragraphs (c)(3) and (c)(4).

Cross references. — Notification of licensing boards of judgments against health care provider, § 51-4-6.

Editor's notes. — Former Code Section 16-5-5, concerning offering to assist in commission of suicide and criminal penalties therefor, was based on Ga. L. 1994,

p. 1370, § 1; Ga. L. 2007, p. 133, § 5/HB 24 and was repealed by Ga. L. 2012, p. 637, § 1/HB 1114, effective May 1, 2012.

Ga. L. 2012, p. 637, § 4/HB 1114, not codified by the General Assembly, provides that: "This Act shall not apply to any offense committed before the effective date of this Act." This Act became effective May 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 278 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 16-5-5 are included in the annotations for this Code section.

O.C.G.A. § 16-5-5(b) unconstitutional. — Former O.C.G.A. § 16-5-5(b) was unconstitutional under the free speech provisions of the United States and Georgia Constitutions, U. S. Const., Amend. 1 and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it was not all assisted suicides that were criminalized but only those that include a public advertisement or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. Final Exit Network, Inc. v. State, 290 Ga. 508, 722 S.E.2d 722 (2012) (decided under former O.C.G.A. § 16-5-5).

ARTICLE 2

ASSAULT AND BATTERY

16-5-20. Simple assault.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Jury Instruction

General Consideration

"Intent to commit injury" inconsistent with negligence.

Defendant was entitled to a new trial because the jury returned mutually exclusive verdicts of involuntary manslaughter, which required the defendant to act with criminal negligence, and aggravated assault potentially based on O.C.G.A. § 16-5-20(a)(1), which required the defendant to act with intent to harm, when the defendant shot in a crowd, killing the victim. Springer v. State, 328 Ga. App. 654, 762 S.E.2d 433 (2014).

Mutually exclusive verdicts.

Since the defendant's conviction for aggravated assault was based on placing the victim in reasonable apprehension of immediately receiving a violent injury, pursuant to O.C.G.A. § 16-5-20(a)(2), the guilty verdict did not preclude the element of criminal negligence in reckless conduct and, therefore, was not mutually exclusive with a verdict of guilt as to serious injury by vehicle predicated on reckless driving. Dryden v. State, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

Appellant's convictions for malice murder, felony murder, aggravated assault, battery, and simple battery were reversed because the verdicts were mutually exclusive of the verdict on reckless conduct as

the former required the jury to find criminal intent and the verdict on reckless conduct required only a finding of criminal negligence and all the verdicts involved the same act by the accused as to the same victim at the same instance of time. Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

Cited in Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011); Gross v. State, 312 Ga. App. 362, 718 S.E.2d 581 (2011); Hall v. State, 313 Ga. App. 66, 720 S.E.2d 181 (2011); Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012); Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012); Sullivan v. Kemp, 293 Ga. 770, 749 S.E.2d 721 (2013); State v. Owens, 296 Ga. 205, 766 S.E.2d 66 (2014).

Application

Reasonable apprehension of violent injury.

Evidence was sufficient to uphold the defendant's conviction for aggravated assault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). Gaither v. State, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Excessive force. — When a decedent was tased once in the prong mode during an arrest, and all subsequent tasings were in the dry stun mode, a deputy and an officer were entitled to qualified immunity as to an excessive force claim because the illegality of their behavior was not clearly established at the time since their conduct did not rise to the level of "obvious clarity," because, inter alia, the decedent committed assault and battery on a police officer, the decedent's acts were contemporaneous with repeated threats to kill the deputy, and the decedent resisted during the entire time that they tried to handcuff the decedent. Hoyt v. Cooks, 672 F.3d 972 (11th Cir. 2012), cert. denied, U.S. , 133 S. Ct. 138, 184 L. Ed. 2d 29 (2012).

Simple assault did not merge with battery. — Trial court did not err in failing to merge the defendant's convictions for simply assault and battery because the convictions were based upon different conduct as the first cut to the victim's forehead caused reasonable apprehension of immediate violent injury supporting the simple assault conviction, and the victim's remaining injuries caused by the knife wounds that followed supported a finding of visible bodily harm to support the battery conviction and each crime required proof of a fact that the other did not. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Jury Instruction

Charge on simple assault not required.

Because defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim's life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the court's charge on aggravated assault under O.C.G.A. § 16-5-21. Cantera v. State, 289 Ga. 583, 713 S.E.2d 826 (2011).

Trial court did not plainly err in the court's jury instruction on aggravated assault when the trial court's instructions included the definition of aggravated assault with a deadly weapon in O.C.G.A. § 16-5-21(a)(2) and tracked the applicable definition of simple assault in O.C.G.A. § 16-5-20(a)(1). Scott v. State, 290 Ga. 883, 725 S.E.2d 305 (2012).

In an aggravated assault case, the trial court properly charged the jury with the applicable assault definition by requiring that the defendant assault the victim with a deadly weapon, and that the act placed another in reasonable apprehension of immediately receiving a violent injury, but by stating that an actual injury to the victim need not be shown; a charge on simple assault was not required simply because the victim suffered no injury.

Jury Instruction (Cont'd)

Marshall v. State, 324 Ga. App. 348, 750 S.E.2d 418 (2013).

Charge on simple assault as element of aggravated assault.

Trial court's jury charge on aggravated assault was not erroneous because the trial court properly tailored the court's charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Failure to charge on simple assault waived. — Appellate review of the trial court's decision not to give a charge on the lesser included offense of simple assault was waived because trial counsel admitted that counsel acquiesced and did not further object to the trial court's decision to not give the charge. Gunter v. State, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Proper jury charge.

Trial court did not refuse to charge on simple assault because the trial court gave verbatim the charge that the defendant complained was not given. Gaither v. State, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Verdict mutually exclusive. — Defendant's involuntary manslaughter and aggravated assault convictions were reversed because an examination of the indictment, the evidence, the jury instructions and the verdict form showed that the jury could have found defendant guilty of aggravated assault under O.C.G.A. § 16-5-20(a)(1) or (a)(2); thus, the appellate court could not conclusively state that the jury's verdict rested exclusively on either criminal negligence or criminal intent so as to eliminate a mutually exclusive verdict. Springer v. State, No. A14A0598, 2014 Ga. App. LEXIS 368 (June 10, 2014).

Intent to harm inconsistent with negligence. — Defendant was entitled to a new trial because the jury returned mutually exclusive verdicts of involuntary manslaughter, which required the defendant to act with criminal negligence, and aggravated assault potentially based on O.C.G.A. § 16-5-20(a)(1), which required the defendant to act with intent to harm, when the defendant shot in a crowd, killing the victim. Springer v. State, 328 Ga. App. 654, 762 S.E.2d 433 (2014).

16-5-21. Aggravated assault.

(a) As used in this Code section, the term "strangulation" means impeding the normal breathing or circulation of blood of another person by applying pressure to the throat or neck of such person or by obstructing the nose and mouth of such person.

(b) A person commits the offense of aggravated assault when he or she assaults:

(1) With intent to murder, to rape, or to rob;

(2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury;

(3) With any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation; or

(4) A person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

(c) Except as provided in subsections (d) through (m) of this Code section, a person convicted of the offense of aggravated assault shall be punished by imprisonment for not less than one nor more than 20 years.

(d) A person who knowingly commits the offense of aggravated assault upon a peace officer while the peace officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(e) Any person who commits the offense of aggravated assault against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than three nor more than 20 years.

(f)(1) As used in this subsection, the term "correctional officer" shall include superintendents, wardens, deputy wardens, guards, and correctional officers of state, county, and municipal penal institutions who are certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35 and employees of the Department of Juvenile Justice who are known to be employees of the department or who have given reasonable identification of their employment. The term "correctional officer" shall also include county jail officers who are certified or registered by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35.

(2) A person who knowingly commits the offense of aggravated assault upon a correctional officer while the correctional officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(g) Any person who commits the offense of aggravated assault in a public transit vehicle or station shall, upon conviction thereof, be punished by imprisonment for not less than three nor more than 20 years. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(h) Any person who commits the offense of aggravated assault upon a person in the course of violating Code Section 16-8-2 where the property that was the subject of the theft was a vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including without limitation any such trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, shall upon conviction be punished by imprisonment for not less than five nor more than 20 years, a fine not less than $50,000.00 nor more than $200,000.00, or both such fine and imprisonment. For purposes of this subsection, the term "vehicle" includes without limitation any railcar.

(i) A person convicted of an offense described in paragraph (4) of subsection (b) of this Code section shall be punished by imprisonment for not less than five nor more than 20 years.

(j) Any person who commits the offense of aggravated assault involving the use of a firearm upon a student or teacher or other school personnel within a school safety zone as defined in Code Section 16-11-127.1 shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(k) If the offense of aggravated assault is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished by imprisonment for not less than three nor more than 20 years.

(l) Any person who commits the offense of aggravated assault with intent to rape against a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this subsection shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(m) A person who knowingly commits the offense of aggravated assault upon an officer of the court while such officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years. As used in this subsection, the term "officer of the court" means a judge, attorney, clerk of court, deputy clerk of court, court reporter, court interpreter, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42. (Laws 1833, Cobb's 1851 Digest, pp. 787-789; Laws 1840, Cobb's 1851 Digest, p. 788; Code 1863, §§ 4250, 4258, 4259, 4260; Ga. L. 1866, p. 151, § 1; Code 1868, §§ 4285, 4293, 4294, 4295; Code 1873, §§ 4351, 4359, 4360, 4361; Code 1882, §§ 4351, 4359, 4360, 4361; Penal Code 1895, §§ 97, 98, 99, 100; Penal Code 1910, §§ 97, 98, 99, 100; Code 1933, §§ 26-1403, 26-1404, 26-1405, 26-1406; Code 1933, § 26-1302, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 543, § 1; Ga. L. 1982, p. 1242, § 2; Ga. L. 1984, p. 900, § 1; Ga. L. 1985, p. 628, § 1; Ga. L. 1991, p. 971, §§ 3, 4; Ga. L. 1994, p. 1012, § 8; Ga. L. 1994, p. 1920, §§ 1, 2; Ga. L. 1996, p. 988, § 1; Ga. L. 1997, p. 1453, § 1; Ga. L. 1999, p. 381, § 3; Ga. L. 2000, p. 1626, § 1; Ga. L. 2003, p. 140, § 16; Ga. L. 2004, p. 1072, § 1; Ga. L. 2006, p. 379, § 4/HB 1059; Ga. L. 2010, p. 999, § 1/HB 1002; Ga. L. 2011, p. 752, § 16/HB 142; Ga. L. 2014, p. 432, § 2-2/HB 826; Ga. L. 2014, p. 441, § 1/HB 911; Ga. L. 2014, p. 599, § 3-1/HB 60; Ga. L. 2015, p. 422, § 5-19/HB 310.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, deleted "paragraph (1) of subsection (a) of" preceding "Code Section" in subsection (i) (now subsection (j)). The second 2014 amendment, effective July 1, 2014, added subsection (a); redesignated former subsections (a) through (l) as present subsections (b) through (m), respectively; in subsection (b), deleted "or" at the end of paragraph (b)(2), added paragraph (b)(3), and redesignated former paragraph (b)(3) as present paragraph (b)(4); substituted "subsections (d) through (m)" for "subsections (c) through (k)" in subsection (c); deleted "years" following "not less than five" near the end of the first sentence of subsection (h); and substituted "paragraph (4) of subsection (b)" for "paragraph (3) of subsection (a)" in subsection (i). The third 2014 amendment, effective July 1, 2014, made identical changes to the first 2014 amendment.

The 2015 amendment, effective July 1, 2015, substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "or probation officer" at the end of subsection (m). See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration

Venue.

Victim's testimony was sufficient evidence to prove venue in Henry County because the victim testified that the aggravated assault offense occurred at the house of the defendant's father, which was located in Henry County; the responding officer likewise testified that the house was located in Henry County. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Identification of defendant. — With regard to defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Extrinsic evidence held harmless. — Defendant's conviction for armed robbery and aggravated assault was affirmed because, given the overwhelming evidence, it was highly unlikely that the admission of the testimony concerning the

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subsequent burglary contributed to the verdict in this case, even if it was erroneous to allow such evidence. Hutchinson v. State, 318 Ga. App. 627, 733 S.E.2d 517 (2012).

Defendant's statements admissible. — With regard to the defendant's conviction for aggravated assault, the trial court did not err by admitting the defendant's statements because the defendant was not in custody at the time the statements were made as the detective met with the defendant at the hospital, no arrest occurred, the defendant was not restrained in any way, and was free to go. Davis v. State, 320 Ga. App. 753, 740 S.E.2d 707 (2013).

Denial of motion to sever.

Trial court did not err in denying the defendant's motion to sever the charges of rape, aggravated assault, kidnapping with bodily injury, and aggravated sodomy arising out of three sexual assaults against three different women because the charges against the defendant clearly showed a recurring pattern of conduct suggesting a common scheme or modus operandi as the victims of the three sexual assaults were adult women who did not know the defendant, all three incidents occurred in DeKalb County within six months of each other, each victim was taken by vehicle to a secluded location before the victims were raped, all three incidents involved a handgun, and semen matching the defendant's DNA profile was found on each victim. Ray v. State, 329 Ga. App. 5, 763 S.E.2d 361 (2014).

Jury determinations.

Testimony of the victim and other state witnesses was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of aggravated assault, criminal damage to property in the second degree, and battery because it was the role of the jury, not the court of appeals, to resolve conflicts in the evidence, assess witness credibility, and decide whether to believe the victim's or the defendant's version of events; the defendant punched the victim, drew a handgun from the defendant's pants, and fired at the victim, and at trial, the victim, the responding officers, and the state's ballistic expert testified to the events. Bryant v. State, 309 Ga. App. 649, 710 S.E.2d 854 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because, although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Jury charge on justification not plain error. — Defendant failed to show plain error in the jury charge on justification because the defendant could not demonstrate that the alleged error in the jury charge likely affected the outcome of the proceedings as the evidence was overwhelming that the defendant was the initial aggressor who attacked the unarmed victim with the metal bar and, thus, that the defendant did not act in self-defense and was guilty of aggravated assault. Tremblay v. State, 329 Ga. App. 139, 764 S.E.2d 163 (2014).

Guilty plea free and voluntary.

Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to aggravated assault because the defendant was thoroughly questioned about the plea, fully informed and cognizant of the rights the defendant was waiving, and fully aware of the consequences of the plea; the purported recantation evidence proffered at the hearing was very weak, and at the plea hearing, the defendant admitted under oath that the defendant committed two acts of aggravated assault. Williams v. State, 315 Ga. App. 704, 727 S.E.2d 532 (2012).

Double jeopardy did not bar retrial. — Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. Roesser v. State, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Victim's apprehension of violent injuries.

Evidence was sufficient to uphold the defendant's conviction for aggravated assault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). Gaither v. State, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Verdict mutually exclusive. — Defendant's involuntary manslaughter and aggravated assault convictions were reversed because an examination of the indictment, the evidence, the jury instructions, and the verdict form showed that the jury could have found defendant guilty of aggravated assault under O.C.G.A. § 16-5-20(a)(1) or (a)(2); thus, the appellate court could not conclusively state that the jury's verdict rested exclusively on either criminal negligence or criminal intent so as to eliminate a mutually exclusive verdict. Springer v. State, No. A14A0598, 2014 Ga. App. LEXIS 368 (June 10, 2014).

Conduct outside scope of involuntary manslaughter.

Defendant was not entitled to a sentence reduction because the aggravated assault and aggravated stalking statutes did not define the same offense and did not address the same criminal conduct, the former offense addressing assault with the object likely to result in serious bodily injury and the latter offense addressing harassment and intimidation of a victim. Myrick v. State, 325 Ga. App. 607, 754 S.E.2d 395 (2014).

Merger not appropriate.

Defendant's aggravated assault convictions did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err in failing to merge the defendant's aggravated assault convictions because, although the convictions arose from the same acts, the convictions did not merge as a matter of fact or law since each count was based upon harm to a different victim. Gaither v. State, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Aggravated assault and armed robbery convictions did not merge for sentencing purposes because the trial court was authorized to conclude that the assault with a gun was a separate act from the armed robbery, which occurred after the victim had been pistol-whipped. McGlasker v. State, 321 Ga. App. 614, 741 S.E.2d 303 (2013).

Trial court erred by merging all four of the family violence aggravated assault verdicts into the malice murder verdict as

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the family violence aggravated assault verdict will not merge into a verdict for murder. Jeffrey v. State, 296 Ga. 713, 770 S.E.2d 585 (2015).

Merger appropriate.

Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, O.C.G.A. § 16-5-21(a)(1) and (a)(2), the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck, and thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in O.C.G.A. § 16-3-21. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's convictions for armed robbery and aggravated assault should have been merged for sentencing, as a co-defendant's actions, which occurred either concurrently or in rapid succession, were committed as part of one uninterrupted criminal transaction and in pursuit of a specific, predetermined goal: the armed robbery of a single victim. Crowley v. State, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Trial court erred in failing to merge defendant's conviction for aggravated assault into defendant's conviction for armed robbery. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Trial court erred by not merging the aggravated assault offense into the armed robbery offense for sentencing purposes, as the evidence showed one transaction, where the defendant pointed the revolver at the victim and took the victim's money and cell phone, and there was not break between that time and when the defendant asked if the defendant should also take the keys to the vehicle. Dean v. State, 327 Ga. App. 9, 755 S.E.2d 245 (2014).

Merger with malice murder conviction.

Defendant's conviction on a second aggravated assault should have merged into the malice murder conviction because the victim sustained two shots to the arm and one fatal shot to the back of the head, and the evidence did not authorize the finding of an additional "deliberate interval" between the second shot to the arm and the shot to the head; both were inflicted in close succession as the defendant confronted the victim. Ortiz v. State, 291 Ga. 3, 727 S.E.2d 103 (2012).

Merger with felony murder. — Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Aggravated assault did not merge with armed robbery.

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Aggravated assault and armed robbery should merge.

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction, the defendant's taking money from the victim at gunpoint, the defendant's aggra-

vated assault conviction against that victim merged with the armed robbery conviction. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Conviction for aggravated assault should have been merged with the defendant's conviction for armed robbery because the convictions both required proof of the same elements. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

Parties to crime.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011).

State did not have to prove the defendant had knowledge of the weapon to be convicted of felony murder, aggravated assault with a deadly weapon, armed robbery, hijacking a motor vehicle, possession of a firearm during a felony, conspiracy to commit armed robbery, and conspiracy to commit hijacking a motor vehicle. The evidence was sufficient to authorize a rational jury to find that the defendant conspired to rob the victims and murder was a reasonably foreseeable consequence of the conspiracy. Hicks v. State, 295 Ga. 268, 759 S.E.2d 509 (2014).

Evidence was sufficient to convict the defendant as a party to the crime of the aggravated assaults of the two victims because the jury could have concluded that the defendant accompanied the others to a house with the intent to invade a rival gang's neighborhood and that the defendant brought a gun in a black bag for that purpose; the co-defendants and other witnesses testified that the defendant had a gun at the time of the shooting, supporting an inference that the defendant displayed the gun, even if the defendant did not shoot the gun; and, after the shooting, the defendant came into the house, wiping off a gun. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Evidence sufficient for conviction.

Evidence was sufficient to support a conviction for aggravated assault since, pursuant to O.C.G.A. § 16-5-21(a)(2), the defendant intentionally committed an act that placed an apartment resident in reasonable apprehension of immediately receiving a violent injury. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for aggravated assault because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. Hill v. State, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when

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the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed aggravated assault, under O.C.G.A. § 16-5-21(a)(2), in the process of hijacking a victim's vehicle because: (1) the defendant showed a gun when the victim resisted the defendant's attempt to take the victim's car; (2) the victim grabbed the gun and tussled with the defendant showed a reasonable apprehension of harm; and (3) the victim was seriously injured. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence that the defendant was in the victim's home after a neighbor heard glass breaking and called 9-1-1, that a ribbon from the defendant's home was used to strangle the victim, that both the victim's and the defendant's DNA were on the ribbon, and that the victim's wedding ring was found in the defendant's pocket supported the defendant's convictions for aggravated assault. Muhammad v. State, 290 Ga. 880, 725 S.E.2d 302 (2012).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person

who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. Jackson v. State, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to support a finding that the defendant was guilty beyond a reasonable doubt of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and possession of a firearm during the commission of a crime against another person, O.C.G.A. § 16-11-106(b)(1), because a witness and a friend testified that they had seen the defendant shoot the victim. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012).

Testimony that the defendant forced the defendant's way into a victim's house, kissed the victim against the victim's will, and attempted to pull the victim's pants down, stopping only when a car drove up, was sufficient to support the defendant's conviction for aggravated assault. Murrell v. State, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

Sufficient evidence supported the defendant's aggravated assault conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Witness's testimony that the witness and the defendant had been smoking crack cocaine down the street from the victim's apartment, the defendant left the house to get more drugs, and the defendant returned agitated and told the witness an old man stole the defendant's crack but the defendant "took care of him," and testimony the victim went head first through a window after being burned supported convictions for voluntary manslaughter and aggravated assault. Haymer v. State, 323 Ga. App. 874, 747 S.E.2d 512 (2013).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony because, although the two passengers of the car committed the actual armed robbery, there was evidence that the defendant, the driver of the car, knew that the two passengers were armed and that the defendant "kind of sort of" knew what they were going to do, which supported a finding that the defendant participated in the robbery as the getaway driver. Smith v. State, 325 Ga. App. 745, 754 S.E.2d 788 (2014).

Evidence, including the defendant's statement to police that the defendant had shot the victim, had meant to shoot the victim, and would have shot the victim again, was sufficient to support the defendant's convictions for aggravated assault and possession of a firearm during the commission of a crime. Taylor v. State, 327 Ga. App. 288, 758 S.E.2d 629 (2014).

Evidence sufficient for conviction of aggravated assault with gun.

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant pointed an air pistol at the victim and threatened to kill the victim. Leeks v. State, 309 Ga. App. 724, 710 S.E.2d 908 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Aggravated assault and felony murder.

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause

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of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence that pointed to the cause of death as suffocation. Davis v. State, 290 Ga. 421, 721 S.E.2d 886 (2012).

Withdrawal of guilty pleas properly denied.

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012), overruled on other grounds.

Trial court did not err in denying the defendant's motion to withdraw a guilty plea to aggravated assault because the victim suffered a burning sensation in the victim's eyes and face, was in a great deal of pain, and was temporarily blinded after the defendant sprayed the victim with mace. Weaver v. State, 325 Ga. App. 51, 752 S.E.2d 128 (2013).

Sentencing.

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. Gillespie v. State, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Defendant's sentence, as a recidivist, of concurrent 20 year terms on each of three counts of aggravated assault, concurrent five year terms on each of three counts of possession of a firearm during the commission of a crime, to run consecutive to the aggravated assault sentence, and concurrent 15 year terms on each of two counts of possession of a firearm by a convicted felon, to run consecutive to the aggravated assault sentence, was not cruel, inhumane, and unusual punishment because each sentence was within the statutory limits of the crimes charged, and the sentence was not grossly disproportionate to the underlying crimes. Willis v. State, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

State did not have the right to appeal sentences imposed by the trial court contrary to a plea agreement under O.C.G.A. § 5-7-1(a)(6) because the 15-year sentences, with five years to serve and the remainder on probation, were not void; they were within the 20-year range of punishments for robbery and aggravated assault, O.C.G.A. §§ 16-5-21(b) & 16-8-40(b). State v. Harper, 279 Ga. App. 620, 631 S.E.2d 820 (2006) was overruled. State v. King, 325 Ga. App. 445, 750 S.E.2d 756 (2013).

Sentence improper.

Defendant was incorrectly sentenced on the aggravated assault charge which was the underlying offense for one of the felony murder charges. Kipp v. State, 294 Ga. 55, 751 S.E.2d 83 (2013).

Sentence not void. — Defendant's 10-year sentence for violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., and aggravated assault was not void as the sentence fell within the range of permitted sentences and, thus, did not amount to a punishment that the law did not allow. Garza v. State, 325 Ga. App. 505, 753 S.E.2d 651 (2014).

Prior conviction properly admitted. — Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under

O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by O.C.G.A. § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the statute itself contains no distinction between defendants and witnesses when more than ten years has passed since the applicable conviction or release. Dozier v. State, 311 Ga. App. 713, 716 S.E.2d 802 (2011), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012).

Cited in Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); McGlasker v. State, 321 Ga. App. 614, 741 S.E.2d 303 (2013); Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013); Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014); State v. Owens, 296 Ga. 205, 766 S.E.2d 66 (2014); Williams v. State, 330 Ga. App. 606, 768 S.E.2d 788 (2015); In the Interest of C. M., 331 Ga. App. 16, 769 S.E.2d 737 (2015); Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015).

Indictment

Written waiver of grand jury indictment required. — Defendant's conviction for aggravated assault was void for lack of jurisdiction and had to be reversed because the evidence showed that the defendant verbally waived the defendant's right to a grand jury indictment at the start of trial and a written waiver was required by O.C.G.A. § 17-7-70(a). Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Consolidation of indictments proper. — Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify the defendant. Jackson v. State, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

Indictment sufficient to charge aggravated assault.

In charging aggravated assault with a deadly weapon under O.C.G.A. § 16-5-21(a)(2) as the predicate offense to felony murder, it was sufficient for the indictment implicitly to allege the use of a hatchet as a weapon which, when used offensively, was likely to result in serious bodily injury. Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012).

There was no basis to grant the defendant a special demurrer on the counts for aggravated assault and felony murder based on assault as the indictment informed the defendant that the state intended to prove that on a day when the defendant admitted the victim was in the defendant's custody, the defendant used an object that was likely to result in serious bodily injury to fatally injure the victim by causing damage to the victim's brain, which was sufficient notice for the defendant to prepare a defense. State v. Wyatt, 295 Ga. 257, 759 S.E.2d 500 (2014).

No fatal variance.

There was not a fatal variance between an allegation that the defendant committed aggravated assault against all three members of a group and evidence that defendant only struck one member of the group because: (1) the evidence showed all three were in a group when the defendant fired a gun at the group; and (2) it was well established that the act of firing a weapon into a group made each individual in the group a separate victim and justified a separate count of aggravated assault for each victim. Martin-Argaw v. State, 311 Ga. App. 609, 716 S.E.2d 737 (2011).

Indictment (Cont'd)

Sufficient to withstand general demurrer. — Indictment alleging that the defendant unlawfully made an assault upon a peace officer engaged in the performance of the officer's official duties with a motor vehicle, an object, which, when used offensively against a person, is likely to or actually does result in serious bodily injury, was sufficient to withstand a general demurrer because the defendant could not admit to the facts other than the fact that the individual was a peace officer without being guilty of the lesser included offense of aggravated assault. State v. Wilson, 318 Ga. App. 88, 732 S.E.2d 330 (2012).

Included Crimes

Offense merged with attempted armed robbery.

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Merger with armed robbery.

Trial court erred in not merging a defendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-5-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. Daniels v. State, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. Davis v. State, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. Hall v.

State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Trial court did not err in failing to merge the aggravated assault count of the indictment with the armed robbery count because the defendant knowingly and voluntarily pled guilty to each of the crimes for which the defendant was indicted, and as a consequence, the defendant waived all defenses except that the indictment charged no crime, including the issue of whether the offenses merged as a matter of law or fact; the defendant chose to admit that the defendant committed the acts so the defendant could avoid a trial on the question of guilt or innocence, and having accepted the benefits of such a bargain, it would be contrary to public policy and the ends of justice to allow the defendant to avoid the consequences of the agreement. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012), overruled on other grounds.

Trial court erred by failing to merge the defendant's convictions for aggravated assault with a deadly or offensive weapon and armed robbery for sentencing purposes because hitting a victim in the head with a handgun while demanding money were not separate and distinct acts but one uninterrupted criminal transaction. Haynes v. State, 322 Ga. App. 57, 743 S.E.2d 617 (2013).

Defendant's conviction and sentence on one count for aggravated assault against the manager of a fast food restaurant as a party to co-defendant's acts had to be vacated because that count was alleged to have been committed by the act of co-defendant striking the manager about the head with the gun during the armed robbery, thus, the aggravated assault arose out of the same act or transaction as the armed robbery and it was included in and merged with the armed robbery as a matter of fact. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge with aggravated battery.

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a deliberate interval, committed an aggravated battery in a different location and on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. Brockington v. State, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Because the defendant's initial act of pointing the gun at the victim's head, an aggravated assault, was a separate act from the ensuing acts of aggravated battery in which the defendant shot and injured both of the victim's hands, the crimes of aggravated assault and aggravated battery did not merge. Thomas v. State, 325 Ga. App. 682, 754 S.E.2d 661 (2014).

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated assault did not merge into the misdemeanor battery. Gross v. State, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Merger of aggravated assault with malice murder.

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pa-

Included Crimes (Cont'd)

thologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. Alvelo v. State, 290 Ga. 609, 724 S.E.2d 377 (2012).

Aggravated assault conviction should have merged into malice murder conviction because it was not clear there was any deliberate interval between the assaults. Schutt v. State, 292 Ga. 625, 740 S.E.2d 163 (2013).

Assault with Deadly Weapon

Assault with knife.

Evidence was sufficient to support the trial court's determination that the defendant committed the offense of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant's attempt to harm a bar patron was transferred to the manager of the bar who was injured; when the defendant retrieved a knife and the manager saw the knife the defendant had committed an act that placed the manager in reasonable apprehension of immediately receiving a violent injury. Brown v. State, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Evidence was sufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the victim testified that the defendant held a knife when the defendant told the victim to take her clothes off and to open her legs so that the defendant could have vaginal intercourse with her against her will; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), that testimony alone was sufficient to support the conviction. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Defendant was properly convicted of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the jury was authorized to conclude that the large knife the defendant held, which was introduced into evidence, was a deadly weapon and that the knife could be easily removed from the knife's sheath; the defendant threatened the victim in a way that put the victim in reasonable apprehension of immediately receiving a violent injury. Gunter v. State, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Defendant's convictions for armed robbery and aggravated assault were supported by sufficient evidence in that, even absent fingerprint evidence, there was the identifications of two eyewitnesses as well as a bottle bearing the store's logo and the amount of cash and same denomination reported stolen found on the defendant's person and the testimony of a victim that the defendant used a knife. Hamlin v. State, 320 Ga. App. 29, 739 S.E.2d 46 (2013).

Evidence before the jury that the defendant said the victim was still alive after the victim's throat was cut because the defendant heard gurgling and testimony from the medical examiner that the victim was not necessarily dead when the victim's throat was slit was sufficient to support the defendant's conviction for aggravated assault based on slitting the victim's throat. Schutt v. State, 292 Ga. 625, 740 S.E.2d 163 (2013).

Defendant's aggravated assault conviction was supported by the victim's testimony that the defendant entered the bedroom with the butcher knife, placed the knife to the victim's face, and cut the victim with the knife, causing the victim to fear for the victim's life. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Evidence sufficient for conviction.

Defendant's new trial motion based on insufficient evidence lacked merit, as the

evidence was sufficient to support the defendant's convictions for aggravated assault and a weapons possession charge under O.C.G.A. §§ 16-5-21(a)(2) and 16-11-106(b)(1); issues of credibility regarding witnesses' identification of defendant as the shooter were within the jury's province pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). Williams v. State, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. Platt v. State, 291 Ga. 631, 732 S.E.2d 75 (2012).

Evidence that the defendant and others were present at the scene of the offense, shot at the victims' vehicle, and wounded two of the victims was sufficient to find the defendant guilty of aggravated assault. Jones v. State, 318 Ga. App. 26, 733 S.E.2d 72 (2012).

Identification of defendant. — Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Assault With Gun

Stun gun.

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault, armed robbery, and attempted armed robbery because, during the confrontation, the defendant stated to one of the victims that the defendant had shot a person the day before; shooting the victims when the defendant was frustrated in the robbery attempts was consistent with the defendant's behavior toward the other victims. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Discharging firearm from within vehicle. — Evidence did not support a charge for involuntary manslaughter as the defendant's act of firing from the car clearly established the felony of aggravated assault and not mere reckless conduct. Browder v. State, 294 Ga. 188, 751 S.E.2d 354 (2013).

Assault during bank robbery. — Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, the defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Sufficiency of circumstantial evidence.

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was sufficient for the jury to infer that the defendant was an armed participant in the crimes. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Evidence sufficient for assault with gun.

Evidence was sufficient to support the defendant's conviction for aggravated assault, under O.C.G.A. §§ 16-5-21(a)(1) and 16-5-21(a)(2), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the

Assault With Gun (Cont'd)

employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle and possessed the gun that the accomplice used in the crime. Gordon v. State, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

Sufficient evidence existed to support the defendant's convictions for aiding and abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the co-defendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the co-defendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here," while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Aggravated assault conviction was supported by evidence that the defendant struggled with the first victim after the first victim tried to take a gun from the defendant, the defendant called for help, and an accomplice who came to help the defendant shot the first victim. Falay v. State, 320 Ga. App. 781, 740 S.E.2d 738 (2013).

Evidence that the defendant was found in the laundry room of the home that was the subject of the home invasion; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence that, after being ejected from a nightclub, the defendant told the bouncer that the defendant was going to the car and would be back, a statement which the bouncer viewed as threatening and meaning that the defendant was going to get a gun, authorized a finding that the bouncer was in reasonable apprehension of receiving a violent injury as shots were fired in the bouncer's direction and supported the defendant's conviction for aggravated assault. Jordan v. State, 322 Ga. App. 252, 744 S.E.2d 447 (2013).

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was sufficient to support the defendant's convictions for criminal street gang activity,

criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Evidence that the defendant approached a group with a gun, causing the children to scream, was sufficient to support the defendant's convictions for aggravated assault upon the restaurant owner's wife and children. Veasey v. State, 322 Ga. App. 591, 745 S.E.2d 802 (2013).

Evidence was sufficient to convict the defendant of terroristic threats, six counts of aggravated assault, and possession of a firearm during the commission of a felony because a witness testified that a vehicle fitting the description of the defendant's car was driven by the shooter who shot at the house of the complainant's mother where the complainant was staying; multiple gunshot holes were found in the side of the home; the complainant testified that, earlier that morning, the defendant had threatened to come to the house and kill the complainant; and the complainant received text messages from the defendant later that morning apologizing for what had happened. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Evidence was sufficient to convict the defendant of aggravated assault and possession of a firearm during the commission of a felony because the victim testified that the defendant shot at the victim at least three times; and the victim's neighbor saw the victim on the ground, and the defendant was standing over the victim. Marshall v. State, 324 Ga. App. 348, 750 S.E.2d 418 (2013).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of aggravated assault and aggravated battery beyond a reasonable doubt because the trial court's final charge to the jury included instructions on the defense of justification; and the victim testified that, at the time in question, the victim did not have a gun, that the victim did not reach for any of the defendant's guns, and that the victim was not attacking the defendant and only charged the defendant after the defendant was aiming a gun at the victim. Price v. State, 325 Ga. App. 564, 754 S.E.2d 144 (2014).

Evidence was sufficient for the jury to find defendant guilty of aggravated assault and terroristic threats based on the trial court properly admitting the victim's testimony identifying defendant as the person who threatened to shoot the victim early in the morning, and the testimony of the victim's friend, who also identified defendant as the person who threatened to shoot the victim. Johnson v. State, 326 Ga. App. 220, 756 S.E.2d 303 (2014).

Victim's testimony that the victim and the defendant were fighting, the defendant left the room and later returned with gun that the defendant held to the victim's side, and the victim heard gunshot and turned to face the defendant, who told the victim that the defendant had been meaning to do that and ran, supported the defendant's convictions for aggravated assault, aggravated battery, and possession of firearm during the commission of a felony. Jones v. State, 326 Ga. App. 151, 756 S.E.2d 267 (2014).

Evidence that the defendant invited the victim to physically fight the defendant after a verbal dispute arose over a dice bet, and that the victim was unarmed while the defendant had concealed a firearm in a pocket, was sufficient to defeat the defendant's justification defense and support the convictions for aggravated assault and possession of a firearm during the commission of a felon. Robinson v. State, 326 Ga. App. 59, 755 S.E.2d 865 (2014).

Evidence was sufficient to support a finding of guilt on six counts of aggravated assault and one count of possession of a handgun by an underage person because the evidence included direct evidence in the form of eyewitness testimony identifying the juvenile as shooting and discarding the gun. In the Interest of T. D. J., 325 Ga. App. 786, 755 S.E.2d 29 (2014).

Sufficient evidence supported defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed defendant to be charged with and convicted of the same offenses as co-defendant since the evidence showed that defendant drove co-defendant to the

Assault With Gun (Cont'd)

fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The defendant later told the victim that the victim was going to commit suicide that night and forced the victim to swallow several unidentified pills. Reynolds v. State, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence supported the defendant's convictions of felony murder during the commission of aggravated assault, aggravated assault, possession of marijuana, and possession of a firearm during the commission of a crime when: (1) after smoking marijuana, the defendant attacked the victim, pulled a gun from defendant's pocket, and shot the victim four times; (2) the victim told the police that the defendant did it; (3) the victim died; (4) a knife was found near the victim, the defendant had a stab wound, and the defendant claimed self-defense; and (5) witnesses one and two saw the defendant pull the gun but did not see the victim with a knife. Hill v. State, 291 Ga. 160, 728 S.E.2d 225 (2012).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Because the victim testified that the defendant held the victim at gunpoint with a rifle, that the victim thought the defendant was going to kill the victim, and that the victim was afraid for the victim's life, the testimony of the victim, standing alone, was sufficient to sustain the defendant's conviction for aggravated assault. Lambert v. State, 325 Ga. App. 603, 754 S.E.2d 392 (2014).

Aiding and abetting in possession of firearm during aggravated assault. — Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the shooter by telling the shooter "you better not let these guys get away, go ahead and handle your business, do what you got to do," and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. Talifero v. State, 319 Ga.

App. 65, 734 S.E.2d 61 (2012).

Evidence sufficient under doctrine of transferred intent. — Evidence was sufficient for a rational trier of fact to find that the defendant was a party to the crime of aggravated assault under the doctrine of transferred intent as the defendant participated in the gun fight that wounded the unintended victim. Jones v. State, 292 Ga. 656, 740 S.E.2d 590 (2013).

Evidence sufficient for aggravated assault of bus driver. — Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated assault with a deadly weapon against a bus driver, O.C.G.A. § 16-5-21(a)(2), because the bus driver testified that the driver did not feel free to drive away since the driver felt the driver's life was in danger; the driver testified that the driver chose not to drive away for fear that the defendant would shoot. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence insufficient for conviction.

Evidence was insufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because there was no affirmative evidence that a restaurant employee saw the defendant with a gun or heard the defendant's threats to shoot; from an officer's description of the scene, the officer did not personally observe the employee climb out of the drive-through window, and thus, the evidence that the employee climbed out of the window rested mainly on the veracity and competence of persons other than the testifying officer, making the testimony hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. § 24-8-801). Santiago v. State, 314 Ga. App. 623, 724 S.E.2d 793 (2012).

Evidence was insufficient to convict the defendant of aggravated assault and possession of a weapon during the commission of the crime; the defendant was out of the officer's view when the defendant fired the gun, no other officer or witness saw the defendant fire the gun, no witness saw where the defendant aimed the gun when the defendant fired the gun, and no forensic or other evidence was introduced which suggested that the defendant fired the gun in the officer's direction. Touchstone v. State, 319 Ga. App. 477, 735 S.E.2d 805 (2012).

Use of a gun to strike victim. — Trial counsel was not ineffective for failing to argue for involuntary manslaughter as a lesser included offense of murder, pursuant to O.C.G.A. § 16-5-3(a), because the jury would have had to believe that the use of a loaded gun to strike the victim was not use as a deadly weapon (or the crime would be assault with a deadly weapon under O.C.G.A. § 16-5-21), and the theory of the defense was that the defendant was not present. Wells v. State, 295 Ga. 161, 758 S.E.2d 598 (2014).

Assault against person other than intended victim. — Since a rational trier of fact could have found that the defendant shot at the bouncer intending to commit a violent injury against the bouncer and that the bullet struck a bystander instead, the evidence authorized the defendant's conviction for aggravated assault against the bystander. Jordan v. State, 322 Ga. App. 252, 744 S.E.2d 447 (2013).

Sentencing.

Defendant's sentences of 20 years in confinement for the aggravated assault on the deceased victim, followed by 20 years for the aggravated assault on the second victim (with five years in confinement and the remainder on probation), followed by an additional 15 years of probation for the charge of participation in criminal street gang activity and another five years' probation for the possession of a firearm during the commission of a felony, to run consecutively to the other sentences, were within the statutory range for those crimes, and did not constitute cruel and unusual punishment. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Assault With Automobile

Officer stepped backward to avoid being struck by car. — Evidence supported the defendant's conviction for aggravated assault, under O.C.G.A. §§ 16-5-21(a)(2) and 16-5-21(c), because, when a police officer who was directing traffic approached the vehicle which the defendant was driving, the defendant pulled the vehicle out of the traffic, sped

Assault With Automobile (Cont'd)

directly toward the officer, and then sped away. Furthermore, the officer specifically testified that the officer believed the vehicle would hit the officer and that the officer stepped backward to avoid being struck. Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Officer's statement on what the defendant saw was admissible. — In the defendant's trial for aggravated assault on a peace officer, which required knowledge of the victim's identity as a police officer, the officer's statement regarding the defendant's attempt to run the officer down in a parking lot, "I know he saw me," was not improper speculation but was based on the officer's perception of events. Favors v. State, 770 S.E.2d 851, No. S14A1797, 2015 Ga. LEXIS 196 (2015).

Evidence of intent sufficient.

Evidence was sufficient to enable the jury to determine that the defendant was guilty of aggravated assault beyond a reasonable doubt because the jury was authorized to infer from the defendant's conduct that the defendant had an intent to injure a driver or anybody who was in the defendant's way while the defendant attempted to elude police; the defendant crashed into the driver's car while the defendant led police on a high-speed chase in a stolen car. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Trial court erred in revoking probation pursuant to O.C.G.A. § 42-8-34.1 on the ground that the probationer committed an aggravated assault in violation of O.C.G.A. § 16-5-21 because there was insufficient evidence that the probationer committed an aggravated assault offense in violation of the terms of probation; there was no evidence supporting an aggravated assault based on an alleged victim's apprehension of injury because even assuming that the probationer's collision with another vehicle while evading an officer was the basis for the aggravated assault charge, there was no evidence as to the occupant's apprehension of receiving an injury or as to his or her conduct showing the injury. Klicka v. State, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

Assault With Hands, Fists, or Other Body Parts

Hands as deadly weapons.

Evidence that the defendant beat the victim about the head with the defendant's hands so hard that the victim's ears rang and was bleeding from both sides of the head was sufficient to support the defendant's conviction for aggravated assault. Ferguson v. State, 322 Ga. App. 565, 745 S.E.2d 784 (2013).

Fists and feet may be deadly weapons.

Evidence was sufficient to convict the defendant of aggravated assault because although hands and feet were not considered per se deadly weapons within the meaning of O.C.G.A. § 16-5-21(a)(2), the jury could find them to be so depending on the circumstances surrounding their use, including the extent of the victim's injuries. Lewis v. State, 317 Ga. App. 218, 735 S.E.2d 1 (2012).

Evidence sufficient to show beating.

Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the child's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries; however, the evidence was sufficient to show an aggravated assault. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Evidence sufficient for assault on infant.

Evidence that the baby had been in the defendant's care for more than two hours when the baby died; that in the medical examiner's opinion, the baby would have died within minutes or hours of suffering a brain injury; and that the autopsy uncovered extensive internal injuries to the baby was sufficient to support the defendant's convictions for cruelty to children, aggravated assault, and aggravated battery. Graham v. State, 320 Ga. App. 714, 740 S.E.2d 649 (2013).

Sufficient evidence supported the defendant's convictions for aggravated battery, aggravated assault, and cruelty to children with regard to the skull fracture and

other head injuries incurred by the defendant's infant son because the expert testimony and medical evidence established that the child's injuries were not accidental but caused by a blow to the head and severe trauma. Oliver v. State, 324 Ga. App. 53, 748 S.E.2d 510 (2013).

Assault With Other Objects

Knives. — Sufficient evidence existed to support defendant's conviction for burglary, aggravated assault, and two counts of cruelty to children in the second degree based on the evidence adduced at trial that the defendant broke into the adult victim's apartment through a rear window and attacked the victim, stabbed the adult victim in the neck, dragged the victim down the hall, and stabbed the victim's hand, and although the defendant put a cloth over the victim's face at some point, the adult victim saw that the person stabbing the victim in the neck was the defendant, the victim's ex-boyfriend, and the victim positively and consistently identified the defendant as the perpetrator. White v. State, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

Sufficient evidence supported the defendant's convictions for aggravated assault with a knife and theft by shoplifting based on the testimony of the loss prevention officer, who witnessed the defendant take the watch, and the testimony of both the loss prevention officer and the store manager, who indicated that the defendant had a knife. Broom v. State, 331 Ga. App. 564, 769 S.E.2d 400 (2015).

Razor blades. — Since the evidence showed the first defendant threatened to cut the victim and hit the victim with a razor blade in the defendant's hand, there was no error in the denial of the defendant's motion for a directed verdict on the aggravated assault charge. Griffin v. State, 292 Ga. 321, 737 S.E.2d 682 (2013).

Scissors. — Evidence that the defendant approached the first victim while holding scissors and threatened the victim supported a conviction for aggravated assault. Bradley v. State, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

Table as tool for assault. — Based on the victim's testimony that the victim was concerned that the victim would be injured by the table the defendant threw at the victim, a rational jury could have found beyond a reasonable doubt that the defendant used the table offensively in a manner that was likely to cause serious bodily injury, supporting the defendant's conviction for aggravated assault under O.C.G.A. § 16-5-21(a)(2). Hendrix v. State, 328 Ga. App. 819, 762 S.E.2d 820 (2014).

Metal objects.

Evidence was sufficient to convict the defendant of aggravated assault because a police officer met with the victim, who identified the defendant as the assailant and told the officer that the defendant had struck the victim with something like a tire iron; the officer found a metal bar that was approximately 18-20 inches long with a 90 degree bend at the end, and at night could have easily been mistaken for a tire iron; the metal bar had a tip on it that was consistent with the shape of the wound on the victim's head; and a rational jury could have found that the state disproved the defendant's self-defense claim as all of the testimony presented at trial pointed to the defendant as the initial aggressor who attacked the unarmed victim. Tremblay v. State, 329 Ga. App. 139, 764 S.E.2d 163 (2014).

Use of a dog. — Officer's testimony that the defendant yelled to the defendant's dog "sic him boy, bite him" before the dog attacked the officer was sufficient to support the defendant's conviction for aggravated assault on a peace officer. Braziel v. State, 320 Ga. App. 6, 739 S.E.2d 13 (2013).

Brick. — Defendant's challenge to the sufficiency of the evidence to support the defendant's aggravated assault conviction failed because the admission of the victim's statement to police that the defendant threw a brick at the victim's vehicle as the victim was driving down the street was not erroneous since the statement was admitted without objection, and an off-duty officer observed glass on the victim and the victim's sister observed glass and speckles of blood on the victim immediately after the incident. Jones v. State, 321 Ga. App. 900, 743 S.E.2d 557 (2013).

Possession of destructive device offense did not merge with aggravated

Assault With Other Objects (Cont'd)

assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Beer bottle.

Evidence was sufficient to convict the defendant of aggravated assault and a violation of the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., because various gang members including the defendant's brother and their associate were on the dance floor flashing gang hand signs and dancing roughly, purposefully bumping into other club patrons, and an altercation ensued; the defendant's brother struck the victim in the back of the victim's head with a beer bottle; the defendant's associate and several others struck the victim and punched the victim in the head; when the victim walked toward the exit door, the defendant hit the victim across the face with a bottle; and the victim was taken by ambulance to a hospital. Dowdell v. State, 325 Ga. App. 593, 754 S.E.2d 383 (2014).

Assault with Intent to Rob

No merger of related offenses.

Trial court did not err in sentencing defendant for aggravated assault of a victim, one with a deadly weapon and the other with intent to rob, because under the case law test, the two crimes did not merge since aggravated assault with intent to rob requires proof of a fact (the intent to rob) that aggravated assault with a deadly weapon does not, and aggravated assault with a deadly weapon requires proof of a fact (the use of a deadly weapon) that aggravated assault with intent to rob does not. Thomas v. State, 292 Ga. 429, 738 S.E.2d 571 (2013).

Trial court did not err in sentencing the defendant for both aggravated assault with intent to rob and felony murder because the aggravated assault with intent to rob charge required the state to prove that the defendant had the intent to rob, which the state did not need to prove for the felony murder conviction based on aggravated assault with a deadly weapon, and the felony murder count required the state to prove that the defendant caused the death of the victim and used a deadly weapon, neither of which the state had to prove for the conviction of aggravated assault with intent to rob. Thomas v. State, 292 Ga. 429, 738 S.E.2d 571 (2013).

Merger required.

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Because the victim was still being pistol whipped while the men asked the victim what the victim had and took the victim's wallet and cell phone, the robbery by use of a handgun was completed at the same place and approximately the same time as the aggravated assault with a handgun; thus, the timing of the offenses of armed robbery and aggravated assault with intent to rob did not preclude their merger. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Because the "assault" element of aggravated assault with intent to rob is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element, there is no element of aggravated assault with intent to rob that is not contained in armed robbery, and the of-

fenses merge. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Evidence sufficient for conviction of robbery and assault.

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Evidence was sufficient to support the defendant's convictions for armed robbery and aggravated assault when, in addition to accomplice testimony implicating the defendant, the descriptions of the defendant's clothing at the time of offenses offered by the accomplice and one of the victims were the same, and the driver of the vehicle in which the defendant left the area testified that, on the day of the robbery, the driver drove the defendant and the accomplice to an area near the location of the offenses, left the car, and upon the driver's return, the defendant and the accomplice were gone, another passenger told the driver to meet the defendant and the accomplice at a gas station across from the scene of the offenses, and the defendant and the accomplice returned to the car at the gas station with a box full of change. Love v. State, 318 Ga. App. 387, 734 S.E.2d 95 (2012).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Evidence was sufficient to support the defendant's convictions for robbery and aggravated assault because the defendant was advised that the mattresses that the defendant was loading into the defendant's truck belonged to the victim; and when the victim attempted to remove the mattresses from the defendant's truck, the defendant attacked the victim, punching the victim in the face, pushing the victim to the ground, and punching the victim in the chest. Aldridge v. State, 325 Ga. App. 774, 755 S.E.2d 19 (2014).

Assault with Intent to Rape

Evidence sufficient for finding defendant guilty of assault with intent to rape.

Trial court did not err in denying the defendant's motion for a directed verdict on a charge of aggravated assault with intent to rape. The evidence that the defendant disrobed the victim, forced her onto a bed, and attempted to have intercourse with her before she pushed him off supported the conviction. Rawls v. State, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Sufficient evidence supported the defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. Smith v. State, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Assault with Intent to Rape (Cont'd)

No merger of rape and aggravated assault. — Aggravated assault and rape convictions did not merge because the assault was complete before the rape and involved a separate and distinct act of force outside that needed to accomplish the rape. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

Jury Instructions

Charge including element not alleged in indictment.

Defendant's conviction for aggravated assault was reversed because given the evidence presented at trial and the absence of any meaningful limiting or curative jury instruction, the erroneous jury charge on aggravated assault resulted in a reasonable probability that the jury convicted the defendant of committing aggravated assault in a manner not charged in the indictment. Easter v. State, 327 Ga. App. 754, 761 S.E.2d 149 (2014).

Instruction on reckless conduct charge not warranted.

Defendant was not entitled to a jury charge on the misdemeanors of reckless conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because, although the defendant relied upon evidence that the defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Jury's consideration limited to facts alleged in indictment.

Trial court's jury charge on aggravated assault was not erroneous because the trial court properly tailored the court's charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Failure to charge jury on simple assault, etc.

Because the defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim's life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the jury's charge on aggravated assault under O.C.G.A. § 16-5-21. Cantera v. State, 289 Ga. 583, 713 S.E.2d 826 (2011).

Appellate review of the trial court's decision not to give a charge on the lesser included offense of simple assault was waived because trial counsel admitted that counsel acquiesced and did not further object to the trial court's decision to not give the charge. Gunter v. State, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Jury charge on aggravated assault, omitting the definition of simple assault, was not erroneous because the only evidence presented was that the victim's injures were consistent with a severe beating and blunt force trauma that precipitated death. Holloman v. State, 293 Ga. 151, 744 S.E.2d 59 (2013).

In an aggravated assault case, the trial court properly charged the jury with the applicable assault definition by requiring that the defendant assault the victim with a deadly weapon, and that the act placed another in reasonable apprehension of immediately receiving a violent injury, but by stating that an actual injury to the victim need not be shown; a charge on simple assault was not required simply because the victim suffered no injury. Marshall v. State, 324 Ga. App. 348, 750 S.E.2d 418 (2013).

Charging jury on aggravated assault.

Trial court did not err in failing to define simple assault in the court's charge to the jury because although in the court's definition of felony murder based on aggravated assault, the trial court did not include a definition of simple assault in the court's charge to the jury on aggravated assault, the trial court did cover the fundamentals of simple assault. Johnson v. State, 289 Ga. 650, 715 S.E.2d 99 (2011).

Defendant could not show that the trial court erroneously charged the jury as to aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant helped induce the trial court into giving the aggravated assault jury charge about which the defendant complained and the charge as a whole was not erroneous in that the trial court's use of the language "actually does" was extraneous. Gross v. State, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Trial court did not plainly err in the court's jury instruction on aggravated assault when the trial court's instructions included the definition of aggravated assault with a deadly weapon in O.C.G.A. § 16-5-21(a)(2) and tracked the applicable definition of simple assault in O.C.G.A. § 16-5-20(a)(1). Scott v. State, 290 Ga. 883, 725 S.E.2d 305 (2012).

Counsel should have challenged the portion of the jury charge on aggravated assault regarding the use of a firearm as a deadly weapon, because the law required the State to prove that the firearm, which was alleged to have been used as a bludgeon or club, was a deadly weapon when the defendant used it to strike the victim on the lip. Byrd v. State, 325 Ga. App. 24, 752 S.E.2d 84 (2013).

Failure to give charges on simple assault and reckless conduct not error. — Trial court did not err when the court refused to charge the jury on simple assault and reckless conduct as lesser included offenses of aggravated assault because the defendant failed to raise a question of fact as to whether the defendant assaulted the victim with a gun and there was no evidence suggesting that the gun went off accidentally. Johnson v. State, 320 Ga. App. 161, 739 S.E.2d 469 (2013).

Charge that tracked the assault language of O.C.G.A. § 16-5-21(a)(2), under which the defendant was indicted, and addressed the specific instrument of the assault that was alleged in the indictment was proper. Braziel v. State, 320 Ga. App. 6, 739 S.E.2d 13 (2013).

Trial court's charge on aggravated assault was not erroneous because the court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense; the trial court's charge tracked the suggested pattern charge on aggravated assault. Clayton v. State, 319 Ga. App. 713, 738 S.E.2d 299 (2013).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). Davidson v. State, 289 Ga. 194, 709 S.E.2d 814 (2011).

Charge on alternative method of committing aggravated assault. — Defendant's objection to the charge for including an alternative method of committing aggravated assault, when the defendant and the defendant's co-defendant were specifically charged with pointing a gun at the victim, was without merit because the trial court merely tracked the suggested pattern charge on aggravated assault, and the indictment was sent out with the jury. Ford-Calhoun v. State, 327 Ga. App. 835, 761 S.E.2d 388 (2014).

Lesser included offense of pointing gun at another.

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such, and therefore, an assault. Dailey v. State, 313 Ga. App. 809,

Jury Instructions (Cont'd)

723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Declining defendant's requested instruction held not error.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Self-defense instruction based on statutory language upheld.

Trial court did not err by refusing to charge the jury on the affirmative defense of self defense because defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. Ransom v. State, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

Jury charge on defense of habitation.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. Philpot v. State, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Offensive weapon. — Defendant failed to preserve for appellate review the defendant's contention that the trial court erred in using the "offensive weapon" definition of O.C.G.A. § 16-8-41(a) as armed robbery was not one of the charged offenses because the defendant did not object to the charge and expressly declined the trial court's offer to recharge the jury. The charge did not constitute plain error because the definition of "offensive weapon" applicable to armed robbery mirrored very closely the definition of aggravated assault set forth in O.C.G.A. § 16-5-21(a)(2), and an "offensive weapon" under the armed robbery statute necessarily would fall within the category of weapons described in § 16-5-21(a)(2), and therefore the defendant could not show that the instruction affected the outcome of the proceedings. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Charge did not omit nexus between violence and gang activity. — With regard to defendant's convictions for aggravated assault and gang-related crimes, the trial court did not commit plain error with regard to its jury instructions because the trial court correctly stated the law by using the statutory language in the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-4(a), in its charge to the jury, so the charge did not omit a nexus between the violence, and it was not possible for the jury to convict defendant without finding that nexus. Skinner v. State, 318 Ga. App. 217, 733 S.E.2d 506 (2012).

Guilty verdict for aggravated assault under O.C.G.A. § 16-5-21(a) was not necessarily inconsistent because an O.C.G.A. § 16-11-102 pointing a gun count (for which petitioner inmate was found not guilty) included the element of acting without justification, an element not involved in the aggravated assault charge; counsel was not ineffective for not requesting an instruction on the specific method of committing the aggravated assault charged. Leroy Banks v. Georgia, No. 12-11237, 2013 U.S. App. LEXIS 7880

(11th Cir. Apr. 19, 2013) (Unpublished).

Charge on criminal negligence warranted. — Court erred by denying the defendant's petition for habeas relief from an aggravated assault conviction because appellate counsel's failure to raise the issue that the trial court erred by failing to charge the jury on negligence was not subjectively a strategic decision but was based upon counsel's lack of familiarity with the relevant law and was deficient. Sullivan v. Kemp, 293 Ga. 770, 749 S.E.2d 721 (2013).

RESEARCH REFERENCES

ALR. — Parts of human body, other than feet, as deadly or dangerous weapons or instrumentalities for purposes of statutes aggravating offenses such as assault and robbery, 67 ALR6th 103.

16-5-23. Simple battery.

(a) A person commits the offense of simple battery when he or she either:

(1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or

(2) Intentionally causes physical harm to another.

(b) Except as otherwise provided in subsections (c) through (i) of this Code section, a person convicted of the offense of simple battery shall be punished as for a misdemeanor.

(c) Any person who commits the offense of simple battery against a person who is 65 years of age or older or against a female who is pregnant at the time of the offense shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(d) Any person who commits the offense of simple battery in a public transit vehicle or station shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(e) Any person who commits the offense of simple battery against a police officer, correction officer, or detention officer engaged in carrying out official duties shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature.

(f) If the offense of simple battery is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished for a misdemeanor of a high and aggravated nature. In no event shall this subsection be applicable to corporal punishment administered by a

parent or guardian to a child or administered by a person acting in loco parentis.

(g) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, relating to long-term care facilities, or Code Section 31-7-12.2, relating to assisted living communities, or Code Section 31-7-12, relating to personal care homes, or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173, relating to home health care and hospices, who commits the offense of simple battery against a person who is admitted to or receiving services from such facility, person, or entity shall be punished for a misdemeanor of a high and aggravated nature.

(h) Any person who commits the offense of simple battery against a sports official while such sports official is officiating an amateur contest or while such sports official is on or exiting the property where he or she will officiate or has completed officiating an amateur contest shall, upon conviction thereof, be punished for a misdemeanor of a high and aggravated nature. For the purposes of this Code section, the term "sports official" means any person who officiates, umpires, or referees an amateur contest at the collegiate, elementary or secondary school, or recreational level.

(i) Any person who commits the offense of simple battery against an employee of a public school system of this state while such employee is engaged in official duties or on school property shall, upon conviction of such offense, be punished for a misdemeanor of a high and aggravated nature. For purposes of this Code section, "school property" shall include public school buses and stops for public school buses as designated by local school boards of education. (Laws 1833, Cobb's 1851 Digest, p. 788; Code 1863, § 4262; Code 1868, § 4297; Code 1873, § 4363; Code 1882, § 4363; Penal Code 1895, § 102; Penal Code 1910, § 102; Code 1933, § 26-1408; Code 1933, § 26-1304, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1987, p. 557, § 1; Ga. L. 1991, p. 971, §§ 5, 6; Ga. L. 1992, p. 2055, § 1; Ga. L. 1993, p. 91, § 16; Ga. L. 1997, p. 907, § 1; Ga. L. 1999, p. 381, § 4; Ga. L. 1999, p. 562, § 3; Ga. L. 2000, p. 16, § 1; Ga. L. 2004, p. 621, § 2; Ga. L. 2005, p. 60, § 16/HB 95; Ga. L. 2011, p. 227, § 3/SB 178; Ga. L. 2015, p. 203, § 3-2/SB 72.)

The 2015 amendment, effective July 1, 2015, deleted "law enforcement dog," following "police officer," in subsection (e).

Editor's notes. — Ga. L. 2015, p. 203, § 3-1/SB 72, not codified by the General Assembly, provides that: "This part of this Act shall be known and may be cited as 'Tanja's Law.'"

JUDICIAL DECISIONS

Analysis

General Consideration
Jury Instructions

General Consideration

Battery against a police officer.

Crimes of felony obstruction of a law enforcement officer and simple battery on a law enforcement officer did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime, and the rule of lenity did not apply; although the defendant was convicted of both charged crimes, the trial court properly merged the misdemeanor battery conviction into the felony obstruction conviction. McMullen v. State, 325 Ga. App. 757, 754 S.E.2d 798 (2014).

Indictment charging involuntary manslaughter sufficiently alleged essential elements of simple battery. — Trial court committed no error in allowing the state to amend an indictment to charge involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a), rather than voluntary manslaughter, because the language of the indictment alleged an offensive use of the fists that resulted in bodily injury, and thus, sufficiently alleged all of the essential elements of simple battery; the indictment alleged that the defendant caused the death of the victim by striking the victim with a fist contrary to the laws of the state, the good order, peace, and dignity thereof and, accordingly, the lesser offense of involuntary manslaughter in the commission of the unlawful act of simple battery was included as a matter of fact in the charged greater offense of voluntary manslaughter. Morris v. State, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Accusation not required to specify instrumentality used. — Accusation for battery, family violence, and criminal trespass that alleged that the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Involuntary manslaughter based on battery verdict not inconsistent with felony murder/cruelty to children verdict.

In a felony murder case involving cruelty to a child, the defendant's convictions for involuntary manslaughter based on simple battery were affirmed because the predicate offense for involuntary manslaughter was simple battery and the intent element of simple battery was not at all logically inconsistent with the mens rea required for the greater offense of aggravated assault, aggravated battery, or cruelty to children; therefore, the verdicts were not inconsistent. Griffin v. State, 296 Ga. 415, 768 S.E.2d 515 (2015).

Evidence sufficient to support conviction. — Sufficient evidence supported a defendant's convictions of robbery under O.C.G.A. § 16-8-40 and simple battery under O.C.G.A. § 16-5-23 since: (1) the defendant grabbed the victim by the throat, put the victim against a wall, and threw the victim onto a table; (2) the victim got a knife; (3) the defendant ran, taking the victim's gaming system and marijuana; and (4) the defendant's claim that the state's main witnesses were not credible was rejected as credibility was a jury matter. Slan v. State, 316 Ga. App. 843, 730 S.E.2d 565 (2012).

Evidence was sufficient to support the defendant's conviction for family violence simple battery as the state presented ample evidence that the defendant struck the defendant's wife in the head and face and bit the wife on the back, and that the amount of force that the defendant used was not justified. Howe v. State, 322 Ga. App. 294, 744 S.E.2d 818 (2013).

Evidence insufficient for conviction.

Although an officer alleged that the defendant threw the defendant's elbows back and forth, evidence was insufficient to support the defendant's conviction for simple battery because the state failed to prove the necessary element of contact. Ewumi v. State, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

Officer lacked probable cause to arrest the defendant for battery because a struggle between the defendant and the officer ensued only after the officer attempted to

General Consideration (Cont'd)

unlawfully arrest defendant for obstruction. Defendant was justified in resisting the unlawful arrest with all force that was reasonably necessary to do so. Ewumi v. State, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

Verdicts for malice murder and other intent crimes were mutually exclusive of reckless conduct verdict. — Appellant's convictions for malice murder, felony murder, aggravated assault, battery, and simple battery were reversed because the verdicts were mutually exclusive of the verdict on reckless conduct as the former required the jury to find criminal intent and the verdict on reckless conduct required only a finding of criminal negligence and all the verdicts involved the same act by the accused as to the same victim at the same instance of time. Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

Restitution authorized. — Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred, and even if others at the scene could have also kicked the victim, that did not negate the defendant's liability for damages caused by the defendant's role in the attack. Elsasser v. State, 313 Ga. App. 661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Cited in Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14 (2012); Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Jury Instructions

Refusal to give requested charge not error. — Trial court did not err in refusing to give the defendant's requested jury charge that consent or lack thereof was an element of simple battery because the trial court correctly charged the jury by quoting the statutory language in O.C.G.A. § 16-5-23(a)(1), and the defendant was allowed to present a consent defense to the jury as a challenge to the "insulting or provoking nature" element. Redding v. State, 318 Ga. App. 84, 733 S.E.2d 383 (2012).

Charging jury as to lesser included offenses.

Trial court did not err in failing to charge the jury on simple battery, O.C.G.A. § 16-5-23, as a lesser included offense of cruelty to a child in the first degree, O.C.G.A. § 16-5-70(b), because the evidence did not authorize such a charge; if the jury believed that an accident occurred, no battery was committed, but if the jury accepted the state's evidence, then the jury was authorized to find that the defendant intentionally assaulted the victim, thereby maliciously causing the victim cruel and excessive physical pain. Furthermore, there was no written request to charge on simple battery in the record on appeal. Elrod v. State, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

16-5-23.1. Battery.

Law reviews. — For comment, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," see 63 Emory L.J. 1163 (2014).

JUDICIAL DECISIONS

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated

assault did not merge into the misdemeanor battery. Gross v. State, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Simple assault did not merge with battery. — Trial court did not err in failing to merge the defendant's convictions for simple assault and battery because the convictions were based upon different conduct as the first cut to the victim's forehead caused reasonable apprehension of immediate violent injury supporting the simple assault conviction, and the victim's remaining injuries caused by the knife wounds that followed supported a finding of visible bodily harm to support the battery conviction and each crime required proof of a fact that the other did not. Watts v. State, 321 Ga. App. 289, 739 S.E.2d 129 (2013).

Accusation not required to specify instrumentality used. — Accusation for battery, family violence, and criminal trespass that alleged the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Family violence battery.

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. Laster v. State, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence was insufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of family violence battery, O.C.G.A. § 16-5-23.1(f), because the state failed to establish the severity of harm required for the offense of battery under § 16-5-23.1(a); the victim's testimony that the defendant "put his hand" on the victim's neck fell short of the evidence required to permit a reasonable trier of fact to infer that the victim suffered substantial physical harm or visible bodily harm. Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14 (2012).

Similar transaction evidence properly admitted.

Trial court acted within the court's discretion in finding that a sufficient similarity existed between a prior transaction and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because in both instances the defendant became enraged and reacted impulsively and aggressively in response to a perceived challenge from a woman, and the prior transaction tended to disprove the defendant's claim of self-defense. Jones v. State, 316 Ga. App. 442, 729 S.E.2d 578 (2012).

Trial court acted within the court's discretion in finding that a sufficient similarity existed between prior transactions and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because the prior transactions involved a female victim who had an intimate relationship with the defendant; both prior transactions involved the defendant reacting violently and disproportionately in response to little or no provocation. Jones v. State, 316 Ga. App. 442, 729 S.E.2d 578 (2012).

Evidence was sufficient, etc.

Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b), was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. Tiller v. State, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury was authorized to find the defendant guilty of family violence battery, O.C.G.A. § 16-5-23.1(f), battery, O.C.G.A. § 16-5-23.1(a), and disorderly conduct because the prior inconsistent statements of the defendant's wife constituted substantive evidence upon which the jury could rely in reaching a verdict; the wife had told officers that she had attempted to leave but that the defendant would not let her, and that he had hit her. Kemp v. State, 314 Ga. App. 730, 726 S.E.2d 447 (2012).

Victim's testimony that the defendant was the aggressor and that the victim sustained visible injuries was sufficient to support the defendant's conviction for battery. Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013).

Evidence was sufficient to support conviction. — Court found that the evidence that the defendant punched the defendant's spouse in the ear, knocking the spouse out of bed and causing the spouse harm, i.e., redness and swelling, that was observed by both the spouse's father and the responding officer, was sufficient to sustain the defendant's conviction for family violence battery under O.C.G.A. § 16-5-23.1(f)(1). Walker v. State, 315 Ga. App. 821, 728 S.E.2d 334 (2012).

Evidence was sufficient to convict the defendant of false imprisonment, theft by taking, and three counts of battery because the defendant locked the victim in the victim's room, struck the victim in the face, hit the victim in the back of the head with a blunt object, threw the victim to the floor when the victim tried to escape, and took the victim's cellphone. Pierre v. State, 330 Ga. App. 782, 769 S.E.2d 533 (2015).

Damage to ear caused by earring sufficient for family violence battery. — Victim's statement that the defendant hit the victim on both sides of the victim's face with the defendant's hand following a verbal argument, causing the victim's earring to puncture the skin behind the victim's left ear, the officer's testimony regarding the victim's injuries, and the photographs of the injuries were sufficient to support the jury's guilty verdict as to family violence battery. Porter v. State, 324 Ga. App. 399, 750 S.E.2d 713 (2013).

Charging jury on entire code section. — Trial court charged the jury on the entire battery code section, including the requirement that the defendant commit substantial physical harm, even though the defendant was only charged with committing visible bodily harm; this was not error because the charge as a whole limited the jury to considering the crime as charged in the indictment. Tiller v. State, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury instruction on prior difficulties. — Trial court did not err by failing to give a limiting instruction before admitting evidence of prior difficulties because the defendant's trial counsel did not request a limiting instruction on the prior difficulties, and the trial court instructed the jury on prior difficulties evidence in the final jury charge. Kemp v. State, 314 Ga. App. 730, 726 S.E.2d 447 (2012).

Justification charge properly refused.

With regard to the defendant's domestic violence convictions, because the defendant acquiesced to the trial court's decision not to charge on justification, the issue of the trial court's refusal to give the requested charge was waived on appeal. Palmer v. State, 330 Ga. App. 679, 769 S.E.2d 107 (2015).

Verdict not inconsistent.

In a felony murder case involving cruelty to a child, the defendant's convictions for involuntary manslaughter based on simple battery were affirmed because the predicate offense for involuntary manslaughter was simple battery and the intent element of simple battery was not at all logically inconsistent with the mens rea required for the greater offense of aggravated assault, aggravated battery, or cruelty to children; therefore, the verdicts were not inconsistent. Griffin v. State, 296 Ga. 415, 768 S.E.2d 515 (2015).

Verdicts for malice murder and other intent crimes were mutually exclusive of reckless conduct verdict. — Appellant's convictions for malice murder, felony murder, aggravated assault, battery, and simple battery were reversed because the verdicts were mutually exclusive of the verdict on reckless conduct as the former required the jury to find crim-

inal intent and the verdict on reckless conduct required only a finding of criminal negligence and all the verdicts involved the same act by the accused as to the same victim at the same instance of time. Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court's discretion. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Cited in Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014).

16-5-24. Aggravated battery.

(a) A person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof.

(b) Except as provided in subsections (c) through (h) of this Code section, a person convicted of the offense of aggravated battery shall be punished by imprisonment for not less than one nor more than 20 years.

(c) A person who knowingly commits the offense of aggravated battery upon a peace officer while the officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 20 years.

(d) Any person who commits the offense of aggravated battery against a person who is 65 years of age or older shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(e)(1) As used in this subsection, the term "correctional officer" shall include superintendents, wardens, deputy wardens, guards, and correctional officers of state, county, and municipal penal institutions who are certified by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35 and employees of the Department of Juvenile Justice who are known to be employees of the department or who have given reasonable identification of their employment. The term "correctional officer" shall also include county jail officers who are certified or registered by the Georgia Peace Officer Standards and Training Council pursuant to Chapter 8 of Title 35.

(2) A person who knowingly commits the offense of aggravated battery upon a correctional officer while the correctional officer is engaged in, or on account of the performance of, his or her official duties shall, upon conviction thereof, be punished by imprisonment for not less than ten nor more than 20 years.

(f) Any person who commits the offense of aggravated battery in a public transit vehicle or station shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years. For purposes of this Code section, "public transit vehicle" has the same meaning as in subsection (c) of Code Section 16-5-20.

(g) Any person who commits the offense of aggravated battery upon a student or teacher or other school personnel within a school safety zone as defined in Code Section 16-11-127.1 shall, upon conviction thereof, be punished by imprisonment for not less than five nor more than 20 years.

(h) If the offense of aggravated battery is committed between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons excluding siblings living or formerly living in the same household, the defendant shall be punished by imprisonment for not less than three nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, pp. 786, 787; Code 1863, § 4238; Code 1868, § 4273; Code 1873, § 4339; Code 1882, § 4339; Penal Code 1895, § 83; Penal Code 1910, § 83; Code 1933, § 26-1201; Code 1933, § 26-1305, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 543, § 2; Ga. L. 1982, p. 3, § 16; Ga. L. 1984, p. 900, § 2; Ga. L. 1985, p. 628, § 2; Ga. L. 1991, p. 971, §§ 9, 10; Ga. L. 1994, p. 1012, § 9; Ga. L. 1996, p. 988, § 2; Ga. L. 1997, p. 1453, § 1; Ga. L. 1999, p. 381, § 5; Ga. L. 2000, p. 1626, § 2; Ga. L. 2003, p. 140, § 16; Ga. L. 2014, p. 432, § 2-3/HB 826; Ga. L. 2014, p. 599, § 3-2/HB 60.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, deleted "paragraph (1) of subsection (a) of" preceding "Code Section" in subsection (g). The second 2014 amendment, effective July 1, 2014, made identical changes.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration

Causation.

In 1985, the Georgia legislature passed an Act "[t]o amend [the Code] relating to crimes of battery, so as to define the crime of ... aggravated battery upon a correctional officer [and] to define the term correctional officer." This language indicated that the Georgia General Assembly intended to create a "separate and distinct crime" from aggravated battery rather than a separate, enhanced penalty based on the victim's status at the time of the battery. Thus, because aggravated battery of a correctional officer is a distinct crime,

the offense requires proof of the essential element of knowledge on the part of the defendant that the individual was a correctional officer at the time of the battery. Taylor v. State, 319 Ga. App. 850, 738 S.E.2d 679 (2013).

Failure to show victim was a correctional officer. — Trial court erred in denying the defendant's motion for a directed verdict as to aggravated battery of a correctional officer because the state failed to establish evidence that the victim was a correctional officer within the definition of O.C.G.A. § 16-5-24(e)(2); the victim was wearing civilian clothes at the time of the offense and had only been working at the facility for five months. Taylor v. State, 319 Ga. App. 850, 738 S.E.2d 679 (2013).

Evidence sufficient to establish venue. — For purposes of the aggravated battery — family violence offense and other offenses occurring in the parties' home, venue was proper in Athens-Clarke County because one of the responding officers of the Athens-Clarke County Police Department directly testified that the house where the defendant and the victim lived was located in Athens-Clarke County. Jones v. State, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

Indictment sufficient. — Counts alleging aggravated battery sufficiently apprised the defendant of what the defendant had to defend against at trial, alleging that the defendant unlawfully and maliciously caused bodily harm to the victim. State v. Wyatt, 295 Ga. 257, 759 S.E.2d 500 (2014).

Aggravated battery charges did not merge. — Because the first count of aggravated battery charged that the defendant rendered the victim's right thumb useless by shooting it, and the second count charged that the defendant seriously disfigured the victim's left hand by shooting it, each aggravated battery verdict was attributable to different conduct than the other aggravated battery verdict, and the trial court was not required to merge the two counts of aggravated battery. Thomas v. State, 325 Ga. App. 682, 754 S.E.2d 661 (2014).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. Hernandez v. State, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Merger with reckless conduct.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery required showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. DeLeon v. State, 289 Ga. 782, 716 S.E.2d 173 (2011).

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge with aggravated battery.

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a deliberate interval, committed an aggravated battery in a different location and on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. Brockington v. State, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Because the defendant's initial act of

General Consideration (Cont'd)

pointing the gun at the victim's head, an aggravated assault, was a separate act from the ensuing acts of aggravated battery in which the defendant shot and injured both of the victim's hands, the crimes of aggravated assault and aggravated battery did not merge. Thomas v. State, 325 Ga. App. 682, 754 S.E.2d 661 (2014).

State failed to present any evidence of venue. — State failed to present any evidence of venue because Liberty County was not mentioned by any witness, and the state showed only that the crime of aggravated assault occurred on a certain street, but the fact that the prosecutor noted in the opening statement that the street was a block from the Liberty County Courthouse did not establish that the crime scene was in Liberty County; the state's photographic evidence failed to establish that the crime occurred in Liberty County because the photograph contained nothing that indicated the city, county, or state in which the area depicted was located. Bizzard v. State, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Cited in Day v. State, 317 Ga. App. 243, 730 S.E.2d 734 (2012); Williams v. State, 330 Ga. App. 606, 768 S.E.2d 788 (2015).

Application

Fractured arm rendering hand useless. — Evidence was sufficient to support a defendant's conviction for aggravated battery based on testimony that the defendant struck the victim with a stick, fracturing the victim's arm above the wrist and rendering the victim's left hand useless. Dean v. State, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Injury to finger and eye. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was rendered useless because the finger was repeatedly struck with a hammer. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Legs rendered useless.

Evidence was sufficient to support the defendant's aggravated battery conviction under O.C.G.A. § 16-5-24(a) because the medical evidence regarding the shooting victim's rehabilitation and the victim's ongoing gait impairment was sufficient to allow the jury to conclude that the victim's legs were rendered useless by the shooting. Jimmerson v. State, 289 Ga. 364, 711 S.E.2d 660 (2011).

Evidence sufficient for aggravated battery because hot bleach thrown on victim.

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. Jackson v. State, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Brain injury to infant.

Evidence that the baby had been in the defendant's care for more than two hours when the baby died; that in the medical examiner's opinion, the baby would have died within minutes or hours of suffering a brain injury; and that the autopsy uncovered extensive internal injuries to the baby was sufficient to support the defendant's convictions for cruelty to children, aggravated assault, and aggravated battery. Graham v. State, 320 Ga. App. 714, 740 S.E.2d 649 (2013).

Skull fracture and other head injuries on infant. — Sufficient evidence supported the defendant's convictions for aggravated battery, aggravated assault, and cruelty to children with regard to the skull fracture and other head injuries incurred by the defendant's infant son because the expert testimony and medical

evidence established that the child's injuries were not accidental but caused by a blow to the head and severe trauma. Oliver v. State, 324 Ga. App. 53, 748 S.E.2d 510 (2013).

Victim with cognitive and memory losses. — Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the victim's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Evidence authorized finding of serious disfigurement.

Evidence was sufficient to support defendant's aggravated battery conviction, which was based upon the serious disfigurement of the victim's eye. The jury was authorized to find that the victim's severely swollen, bruised eye and eye socket fracture constituted serious disfigurement. Feagin v. State, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

Sufficient injury to warrant conviction for aggravated battery.

Evidence was sufficient to support the defendant's conviction for aggravated battery, O.C.G.A. § 16-5-24(a), because the evidence was sufficient for the jury to determine that the defendant caused the victim to sustain visible, severe burns and large hypertrophic scars on the victim's skin, which required ongoing surgeries and corrective procedures; because the evidence established that the defendant caused the victim's skin to be seriously disfigured, burned, and scarred, the aggravated battery conviction was authorized. Wells v. State, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Trial court did not err in convicting the defendant of aggravated battery because the evidence was sufficient for any rational trier of fact to conclude beyond a reasonable doubt that the defendant's blows rendered the victim's mouth and jaw useless and that the defendant was guilty of aggravated battery beyond a reasonable doubt; the victim testified that the victim's jaw did not function normally after the victim was injured. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Victim's testimony that the victim and the defendant were fighting, the defendant left the room and later returned with gun that the defendant held to the victim's side, and the victim heard gunshot and turned to face the defendant, who told the victim that the defendant had been meaning to do that and ran, supported the defendant's convictions for aggravated assault, aggravated battery, and possession of firearm during the commission of a felony. Jones v. State, 326 Ga. App. 151, 756 S.E.2d 267 (2014).

Evidence that, for several months after the shooting, the victim struggled to write and to care for the victim, had to rely on another person for help in tasks such as cooking and bathing, and had to undergo physical therapy, authorized the defendant's conviction for aggravated battery. Smith v. State, 328 Ga. App. 863, 763 S.E.2d 251 (2014).

Evidence sufficient to support conviction.

Evidence was sufficient to support the defendant's conviction for aggravated battery, under O.C.G.A. § 16-5-24(a), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The victim lost sight and required surgery to correct all the facial fractures which the victim suffered. Reynolds v. State, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was enough to prove beyond a

Application (Cont'd)

reasonable doubt that the defendant committed aggravated battery in violation of O.C.G.A. § 16-5-24 because the defendant acted intentionally and without provocation or justification when the defendant struck the victim; the defendant physically assaulted the victim and repeatedly told the victim that the defendant was going to kill the victim, and the defendant hit the victim in the face with such force that the victim lost consciousness. Bizzard v. State, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Victim's testimony that defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of aggravated assault and aggravated battery beyond a reasonable doubt because the trial court's final charge to the jury included instructions on the defense of justification; and the victim testified that, at the time in question, the victim did not have a gun, that the victim did not reach for any of the defendant's guns, and that the victim was not attacking the defendant and only charged the defendant after the defendant was aiming a gun at the victim. Price v. State, 325 Ga. App. 564, 754 S.E.2d 144 (2014).

Victim's testimony alone was sufficient to support a finding that the defendant attacked the victim and was guilty of aggravated battery. Patterson v. State, 327 Ga. App. 695, 761 S.E.2d 101 (2014).

Evidence sufficient for aggravated battery against child.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

Sentencing.

It was not erroneous for the trial court to impose a sentence of 20 years for aggravated battery, O.C.G.A. § 16-5-24, because after the defendant's kidnapping conviction was voided, the trial court was authorized under O.C.G.A. § 17-10-1 to sentence the defendant to a term of years on the aggravated battery count, which could consist of up to 20 years. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Trial court did not err by correcting the court's written sentence to conform with its oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Supervised release properly revoked as aggravated battery was vio-

lation of condition of supervised release. — Inmate's supervised release was properly revoked and a sentence of imprisonment imposed because there was sufficient evidence to establish that the inmate committed a violation of a condition thereof by committing robbery and aggravated battery in Georgia. United States v. Hart, 2014 U.S. App. LEXIS 744 (11th Cir. Jan. 15, 2014) (Unpublished).

Jury Instructions

Instructions to jury.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. Philpot v. State, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Even though the trial court erred by mistakenly labeling the crime as aggravated assault before reading the charge for aggravated battery, the error was not reversible because the trial court went on to state that the crime at issue was aggravated battery and accurately read the substance of the count to the jury. In addition, a written copy of the indictment went out to the jury and the verdict form accurately listed the count as aggravated battery. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Trial court's alleged overcharge on aggravated battery did not amount to harmful error because any overcharge was cured by the trial court's instruction to the jury that the burden of proof was with the state to prove every material allegation of the crimes charged in the indictment. Lenoir v. State, 322 Ga. App. 583, 745 S.E.2d 824 (2013).

Instruction on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming arguendo that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error, as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

Trial court did not err by refusing to charge the jury on the affirmative defense of self-defense because the defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. Ransom v. State, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

16-5-27. Female genital mutilation.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 3

KIDNAPPING, FALSE IMPRISONMENT, AND RELATED OFFENSES

16-5-40. Kidnapping.

Cross references. — Prohibition on minimum waiting periods for initiating missing person report, § 35-1-18.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Refusal to sever charges.

Trial court did not err in denying the defendant's motion to sever the charges of rape, aggravated assault, kidnapping with bodily injury, and aggravated sodomy arising out of three sexual assaults against three different women because the charges against the defendant clearly showed a recurring pattern of conduct suggesting a common scheme or modus operandi as the victims of the three sexual assaults were adult women who did not know the defendant, all three incidents occurred in DeKalb County within six months of each other, each victim was taken by vehicle to a secluded location before the victims were raped, all three incidents involved a handgun, and semen matching the defendant's DNA profile was found on each victim. Ray v. State, 329 Ga. App. 5, 763 S.E.2d 361 (2014).

"Asportation" of the victim, etc.

Evidence was sufficient to sustain defendant's kidnapping conviction based on defendant's jumping into a soft drink delivery truck and forcing the driver at gunpoint to drive more than six miles from a lighted parking lot to a secluded dirt road, thereby isolating the driver and making it less likely that anyone would discover the driver's predicament and come to the driver's aid. Howard v. State, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

Defendant's movement of a victim from the outside of a storage unit to inside the unit, where the defendant produced a knife and attempted to rape the victim, was sufficient to show asportation as required under the kidnapping statute, O.C.G.A. § 16-5-40(a). Although the movement was of brief duration, the movement was not an inherent part of the other offenses. Smith v. State, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Georgia General Assembly amended the kidnapping statute in 2009 to provide that slight movement is sufficient to prove asportation. Arnold v. State, 324 Ga. App. 58, 749 S.E.2d 245 (2013).

Relationship to Other Offenses

No merger of kidnapping and robbery by intimidation.

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. Aldridge v. State, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Kidnapping and false imprisonment all separate offenses.

Defendant's conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim's will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not merge. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Jury Instructions

Failure to instruct on false imprisonment not harmless. — Defendant's conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so as to render the trial court's failure to give the charge harmless. Curtis v. State, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Jury sufficiently instructed on asportation.

Trial court's error of not properly instructing the jury was not reversible because it was highly probable that the error in not instructing the jury to consider the asportation element of kidnapping using the Garza factors did not contribute to the judgment of guilt on that charge since the movement of the victim and the baby was from the living room to the bedroom and was of minimal duration and the movement was not necessary to effect the completion of the burglary or aggravated assault. Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015).

Punishment

No merger with aggravated assault.

Trial court did not err in declining to merge under O.C.G.A. § 16-1-7(a) kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Mandatory minimum sentence. — O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), as applied to the defendant, did not violate due process because an earlier indictment charged regular kidnapping and, only after plea negotiations failed, was the more severe sentence included in a re-indictment because such circumstances did not raise a presumption of prosecutorial vindictiveness in the absence of actual evidence thereof. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2) do not violate equal protection by punishing a person differently depending on the age of the victim because that classification is not arbitrarily drawn and instead is rationally related to the legitimate governmental interest in protecting children. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Sentence proper.

Trial counsel did not render ineffective assistance by failing to raise the constitutionality of the defendant's mandatory minimum sentence of 25 years imprisonment without parole, as codified in O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), because the defendant's concurrent 25-year sentences for child kidnapping did not raise a threshold inference of gross disproportionality; after beating the mother in the young children's presence so severely as to break her jaw and cause other injuries, the defendant ordered all three of the victims to enter a car, drove the victims away, and left the victims in a location where the victims

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were isolated and unprotected. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Cruel and unusual punishment claim waived on appeal. — Defendant's appeal of an order denying the defendant's motion for new trial was transferred to the court of appeals because the claim that the defendant's sentence under O.C.G.A. § 16-5-40(d)(4) for kidnapping with bodily injury violated the cruel and unusual punishments clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. XVII, did not invoke the supreme court's constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); because the cruel and unusual punishment claim was not timely raised in the trial court, review of the claim's merits was waived on appeal, Brinkley v. State, 291 Ga. 195, 728 S.E.2d 598 (2012).

Application

Evidence was sufficient to sustain defendant's conviction for attempt to kidnap, etc.

Evidence that the defendant entered an occupied motor vehicle and commanded the driver to "drive or die," while wielding a rock in a sock supported the defendant's conviction for criminal attempt to commit kidnapping. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Evidence sufficient to support conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

When the second victim was moved from the front door, through the house, and into the bedroom the element of asportation was established; the movement enhanced the defendant's control over the second victim and isolated the second victim from protection or potential rescue. Goolsby v. State, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Evidence fully supported the defendant's kidnapping convictions because the defendant forced the victims into a bathroom after the defendant had robbed two other victims, and the movement was not an integral part of the armed robbery offenses; herding the victims into the small and confined bathroom made it easier for the defendant to control the victims, thus making the situation more dangerous for the victims. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. Sipplen v. State, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Sufficient evidence supported the defendant's conviction for kidnapping because, even if the victim's entry into the defendant's truck was voluntary, the defendant did so under the mistaken belief that the defendant would take the victim to the hospital, and the victim attempted to escape further attack after the defendant stopped on the side of the road; at that point, the defendant caught the victim, again stabbed the victim numerous times, and dragged the victim by the legs into a ditch, effectively concealing the victim from passing traffic, when the victim was unable to move or otherwise resist. Calloway v. State, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

As to three victims, the evidence was sufficient to support the kidnapping counts because the victims were removed from bedrooms and taken to the living room where the victims were restrained. The movement of those victims was not an

inherent part of the burglary, armed robbery, or firearm offenses as it was not necessary to effect the completion of those crimes. Holder v. State, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Evidence which included DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Testimony of the female victim and the accomplice that the defendant held a pistol on both victims and demanded and took cash from the male victim, along with the DNA evidence on the floor at the scene of the rape, was sufficient for the jury to find that the defendant was guilty of kidnapping with bodily injury (by rape) and rape against a female victim and kidnapping and armed robbery against a male victim. Brinkley v. State, 320 Ga. App. 275, 739 S.E.2d 703 (2013).

Defendant's movement of the victim was not merely incident to any other offense and was sufficient to establish asportation as the movement of the victim took place after the defendant grabbed the victim and lifted the victim and moved the victim from the victim's aunt's backyard and down the alley, passing at least three houses. Thomas v. State, 320 Ga. App. 101, 739 S.E.2d 417 (2013).

Evidence that the defendant choked and punched the victim in the victim's car, and then pulled the victim back into the car by the shirt and hair after the victim attempted to flee was sufficient to support the conviction for kidnapping with bodily injury. Hairston v. State, 322 Ga. App. 572, 745 S.E.2d 798 (2013).

Evidence insufficient to support conviction.

When the first victim was forced back "just a few steps" to the couch, the movement occurred before the rape and was incidental and in furtherance of the rape, and the movement was not a necessary element of the rape, the evidence did not support the defendant's conviction for kidnapping with bodily injury. Goolsby v. State, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Insufficient evidence of asportation.

Evidence on a kidnapping charge was insufficient to satisfy the element of asportation because the movement of the victim was of short or minimal duration, occurring during the course and incidental to assaults upon the victim; the movement occurred after the assault on the victim had begun when the victim attempted to fight back against the attackers, and the attackers were struggling to regain control over the victim and subdue the victim, but as soon as the victim was subdued and bound, the victim was returned to the room where the assault on the victim's person continued. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Defendant was entitled to reversal of a conviction for kidnapping under O.C.G.A. § 16-5-40(a) because the victim's movement did not constitute the necessary asportation; the act of forcing the victim from a standing position to laying on the floor was merely a positional change of minimal duration that occurred while the burglary and armed robbery were in progress and were incidental to those crimes. Wilson v. State, 318 Ga. App. 37, 733 S.E.2d 345 (2012).

As to one of the four victims, the evidence was insufficient to support the kidnapping count because the duration of the movement was minimal and it was incidental to the other crimes; the subject victim was already in the living room and simply made to sit down there. Holder v. State, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Conviction for kidnapping with bodily injury was properly set aside because the facts did not support a finding of asportation as the movement of the victim was merely incidental to the aggravated assault. The movement of the victim occurred as part of a beating, and there was nothing to suggest that the movement presented a significant danger to the victim independent of the assault. Sellars v.

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Evans, 293 Ga. 346, 745 S.E.2d 643 (2013).

Defendant's conviction for kidnapping required reversal because the movement of the victim from one bedroom to another did not further isolate the victim or decrease the potential for rescue, thereby posing no significant danger to the victim independent of the danger posed by the sexual assault and rape, thus, the evidence of asportation was insufficient. Sellers v. State, 325 Ga. App. 837, 755 S.E.2d 232 (2014).

Sufficient evidence of asportation.

Evidence was sufficient to prove the element of asportation and to support the defendant's kidnapping conviction where the defendant snatched the victim from the sidewalk, forced the victim across a parking lot and onto the premises of a restaurant, took the victim up a flight of stairs to a secluded deck where the victim could not be seen, and then raped the victim. Although the duration of the movement was relatively short, and although the movement facilitated the rape, the movement did not constitute an inherent part of that rape. The defendant's movement of the victim substantially isolated the victim from protection or rescue. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Movement at issue was sufficient evidence of asportation because, after the defendant assaulted the victim, the defendant forced the severely injured victim at gunpoint to leave the victim's house, walk through a trail behind the house to a secluded wooded area, made the victim kneel on the ground on the victim's hands and knees, and for a significant period of time threatened to kill the victim or the victim's children as the victim begged for the victim's life. The defendant's actions further isolated the victim, thereby creating additional danger to the victim and removing the victim from the possibility of rescue or escape, and reinforced the defendant's control over the victim. Reynolds v. State, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

There was sufficient evidence of asportation to support the defendant's kidnapping convictions because, after the defendant robbed the cash register, the defendant forced the victims to move from the front of the store to the back of the store and later further back into an office; the further movement into the back office occurred after the robbery was completed, and that movement was not a necessary or inherent part of the robbery but created additional danger to the victims. Green v. State, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

Defendant's act of dragging the victim by the hair inside a house to begin an attack anew, after the victim temporarily managed to escape and was screaming for help, was sufficient evidence of asportation to support the defendant's kidnapping conviction because although the movement was arguably of minimal duration, the act was not an inherent part of the violent attack that the victim had endured; instead, the defendant's act allowed the defendant to reassert control over the victim and to reinitiate the savage beating without interference, further isolating the victim from rescue and increasing the victim's risk of harm. Curtis v. State, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Defendant's act of grabbing one victim by the throat and pulling that victim from the kitchen into the living room was sufficient evidence of asportation to support the defendant's kidnapping conviction. The defendant's act of dragging the other victim inside the home to resume a beating was sufficient evidence of asportation as to that victim. Although the duration of the movement was brief, each act allowed the defendant and the co-defendant to control their victims without interference, further isolating the victims from rescue and increasing the risk of harm. Tolbert v. State, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping convictions because the defendant's removal of children from their bedrooms by gunpoint and into the kitchen was not an inherent part of the crimes as the children's movement to the kitchen was not necessary to effect the completion

of the burglary, armed robbery, or aggravated assault; also, by moving the children from their rooms, the children were placed in greater danger because the defendant and the accomplice's control over the children was enhanced. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the defendant moved the victims from the front of a pawn shop into a back office in order to isolate the victims from outside view and to significantly decrease the chance that the victims could summon assistance, the element of asportation was satisfied; therefore, the defendant was properly convicted of kidnapping under O.C.G.A. § 16-5-40. Onumah v. State, 313 Ga. App. 269, 721 S.E.2d 115 (2011).

All four factors that had to be considered in determining whether the asportation element of kidnapping was met had been satisfied because the duration of the movement of the victims to a car and while riding therein occurred after the offense of aggravated assault was completed; the movement presented a significant danger to the victims apart from the separate offense because it enhanced the defendant's control over the victims, serving substantially to isolate the victims from protection or rescue and increasing the risks that further injury would occur in the event of an attempted escape and that the victims would be taken to a second location. Jones v. State, 290 Ga. 670, 725 S.E.2d 236 (2012).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping with bodily injury conviction because movement occurred when the defendant pressed a knife to the victim's throat and forced the victim from the kitchen into the bedroom where the defendant raped and sodomized the victim and committed armed robbery; the movement was not an inherent part of the crimes because the victim's movement to the bedroom was not necessary to effect the completion of the rape, aggravated sodomy, or armed robbery. Holden v. State, 314 Ga. App. 36, 722 S.E.2d 873 (2012).

State proved the existence of "asportation," one of the essential elements of kidnapping with bodily injury, as the victim was forcibly moved at gunpoint from the front of the house to a back bathroom and that the movement did not occur during the commission of the other offenses. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence that the movement, while not necessarily lengthy, was long enough to satisfy the duration element; the movement did not occur during the aggravated battery but rather after the first beating and before a second beating; that the movement was not an inherent part of the beating; and that the movement itself presented a danger to the victim because the victim was moved to a secluded location in the middle of the night was sufficient to support the asportation element of kidnapping. Williams v. State, 291 Ga. 501, 732 S.E.2d 47 (2012).

By forcing the victim to have sexual intercourse in the living room, stopping the victim from escaping, then forcing the victim to a nearby bedroom and forcing sex again, the defendant made it substantially easier to commit the charged offense of rape in the bedroom and lessened the risk of detection, thus, the movement of the victim was not merely incidental to any other charged offense, and the evidence was sufficient to establish the asportation element of the kidnapping charge. Ward v. State, 324 Ga. App. 230, 749 S.E.2d 812 (2013).

Removal of two victims from the victims' vehicle, binding the victims with electrical ties and duct tape, and placing one victim in the back seat of the victim's vehicle while the other lay on the ground, concealed the victim in the car, isolated the two victims, and made the commission of the armed robbery and murders substantially easier; therefore, movement of the victims was not merely incidental to the other offenses, O.C.G.A. § 16-5-40(b)(2)(A), (B). Dennis v. State, 293 Ga. 688, 748 S.E.2d 390 (2013).

Sufficient evidence under the established case law standard supported the jury finding the defendant guilty of kidnapping based on the evidence showing that although the time and distance spanned by the defendant's forceful dragging of the victim out of the house away

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from the protection of the victim's teenage son, through the yard, and into the neighbor's yard may not have been lengthy, the movement was of sufficient duration to satisfy a finding of asportation. Arnold v. State, 324 Ga. App. 58, 749 S.E.2d 245 (2013).

16-5-41. False imprisonment.

JUDICIAL DECISIONS

Analysis

General Consideration

Identification of defendant. — With regard to the defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Essential difference between kidnapping and false imprisonment, etc. State's evidence established the element of asportation for kidnapping under O.C.G.A. § 16-5-40(a) by showing that, while the victim willingly entered the defendant's vehicle, the victim demonstrated the desire to escape by jumping from the defendant's vehicle and trying to call 9-1-1 for help. The defendant moved the victim against the victim's will by dragging the victim back into the vehicle and continuing to drive; thus, the defendant's movement of the victim in the vehicle was not a criminally insignificant circumstance attendant to some other crime. Day v. State, 317 Ga. App. 243, 730 S.E.2d 734 (2012).

Citizen's arrest not valid defense to offense of false imprisonment. — Trial evidence showed that defendant confined the victim in the bedroom without lawful authority. In light of defendant's testimony that the victim had not been confined at all, trial counsel was not ineffective in failing to pursue jury instructions based on an inconsistent theory that defendant had in fact confined the victim, but was legally authorized to do so. Smith v. State, 314 Ga. App. 583, 724 S.E.2d 885 (2012).

Crime creates risk of violent injury. — Georgia cases made clear that false imprisonment in violation of O.C.G.A. § 16-5-41 ordinarily creates risks of physical injury to another similar to the risks of burglary: the risk of a violent confrontation between the offender and the person being falsely imprisoned, including the risk that the offender will have to inflict serious physical injury to detain the victim. And, just as with burglary, the offender's awareness that such a confrontation is possible and could be necessary indicates that the offender may well be prepared to use violence if necessary to complete the crime or to escape. United States v. Chitwood, 676 F.3d 971 (11th Cir. 2012), cert. denied, U.S. , 133 S. Ct. 288, 184 L. Ed. 2d 169 (2012).

Cited in Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

Application

False imprisonment of customers during bank robbery. — Evidence was sufficient to support the defendant's convictions for false imprisonment in violation of O.C.G.A. § 16-5-41 based on testimony from witnesses inside the bank that the defendant was armed and told the victims to get down and the victims did

not feel that they could leave while the defendant was in the bank. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

False imprisonment as lesser included offense of kidnapping with bodily injury.

Trial court did not err in allowing the jury to consider the lesser included offense of false imprisonment after granting a directed verdict on the kidnapping charges against defendant because false imprisonment was a lesser included offense of kidnapping, and the indictment against defendant contained all the essential elements related to false imprisonment. Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Kidnapping and false imprisonment.

Defendant's conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim's will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not merge. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

False imprisonment occurring during rape.

Evidence was more than sufficient to support the defendant's false imprisonment conviction because the victim testified that after the defendant finished raping her, she felt like she could not leave the house since the defendant had a knife, and the defendant's mental state appeared unstable; one of the responding officers also testified that the victim was visibly traumatized, physically shaking, and crying upon her release from the house. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Evidence sufficient to support conviction.

Jury's verdict convicting a defendant of false imprisonment was supported by evidence that the defendant threatened the victim, a 65-year-old widow, and ordered her to stay on her bed in the nude while the defendant spit on her and cursed her, then ordered her to sit in a filled bathtub where the defendant threatened to drop a hair dryer into the tub with her. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence was sufficient to support the defendant's conviction for false imprisonment, under O.C.G.A. § 16-5-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the

Application (Cont'd)

attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Evidence that the defendant and an accomplice entered a store and the defendant approached two women, pulled out a gun, forced the women and children to the back of the store, and forced them to lie on the floor while the defendant and the accomplice forced an employee to give them money was sufficient to support defendant's robbery and false imprisonment convictions. Taylor v. State, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

Evidence that the defendant came into the victim's hotel room uninvited, put a hand across the victim's mouth, and laid on top of the victim, confining the victim's movement and rendering the victim unable to resist was sufficient to support the defendant's conviction for false imprisonment. Murrell v. State, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

Sufficient evidence supported the defendant's false imprisonment conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

While the victim initially identified someone else as the assailant, evidence that that defendant's DNA matched the seminal fluid found on the victim's clothing, the defendant was seen near the house shortly after the rape, and the defendant's shirt was found in the residence supported the defendant's convictions for rape, child molestation, false imprisonment, and burglary. Couch v. State, 326 Ga. App. 207, 756 S.E.2d 291 (2014).

Victim's testimony that the victim could not leave through the only door to the mobile home after a codefendant came from the rear with a pointed gun, because the defendant was guarding the door, pulled out a gun, and threatened to kill the victim supported the defendant's conviction for false imprisonment. Kiser v. State, 2014 Ga. App. LEXIS 119 (Mar. 7, 2014).

Trial court properly denied defendant's motion for a directed verdict as to the false imprisonment charge because the evidence showed that, after moving the victim into the backseat of defendant's vehicle, defendant sat on the victim's chest and forced fingers into the victim's vagina despite pleas to stop from the victim, and did not stop until distracted by a stop sign

and exited the vehicle, which gave the victim an opportunity to leave. Nichols v. State, 325 Ga. App. 790, 755 S.E.2d 33 (2014).

Given the victim's testimony that the victim could not leave through the only door to a mobile home because the defendant was blocking the door, holding a gun, and threatening to kill the victim, leading the victim to jump through a glass window, the evidence was sufficient to support the defendant's false imprisonment conviction under O.C.G.A. § 16-5-41(a). Kiser v. State, 327 Ga. App. 17, 755 S.E.2d 505 (2014).

Evidence was sufficient to convict the defendant of false imprisonment, theft by taking, and three counts of battery because the defendant locked the victim in the victim's room, struck the victim in the face, hit the victim in the back of the head with a blunt object, threw the victim to the floor when the victim tried to escape, and took the victim's cellphone. Pierre v. State, 330 Ga. App. 782, 769 S.E.2d 533 (2015).

Sufficient factual basis for false imprisonment charge. — Trial court did not abuse the court's discretion in refusing to allow withdrawal of the defendant's guilty plea on the ground that the factual basis set forth by the state was insufficient to support the false imprisonment charge, O.C.G.A. § 16-5-41, because the state's recitation of facts reflecting that the defendant had detained the victim on a bed and inside the defendant's residence presented a sufficient factual basis for the false imprisonment charge. James v. State, 309 Ga. App. 721, 710 S.E.2d 905 (2011).

Jury Instructions

Jury instructions proper.

As to the false-imprisonment counts, pretermitting whether the trial court erred in the case, the court cured any defect in the court's jury charge on false imprisonment by instructing the jury that the state must prove every material allegation in the indictment beyond a reasonable doubt, further instructing that the jury could only find the defendant guilty if it found beyond a reasonable doubt that the defendant committed the crime charged, and sending the indictment out with the jury during the jury's deliberations. Curry v. State, 330 Ga. App. 610, 768 S.E.2d 791 (2015).

Jury instruction on false imprisonment should have been given.

Defendant's conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so as to render the trial court's failure to give the charge harmless. Curtis v. State, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

16-5-44.1. Hijacking a motor vehicle.

(a) As used in this Code section:

(1) "Firearm" means any handgun, rifle, shotgun, or similar device or weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge and includes stun guns and tasers as defined by subsection (a) of Code Section 16-11-106, as amended, and any replica, article, or device having the appearance of a firearm.

(2) "Motor vehicle" means any vehicle which is self-propelled.

(3) "Weapon" means an object, device, or instrument which when used against a person is likely to or actually does result in serious

bodily injury or death or any replica, article, or device having the appearance of such a weapon including, but not limited to, any object defined as a hazardous object by Code Section 20-2-751 or as a dangerous weapon by Code Section 16-11-121.

(b) A person commits the offense of hijacking a motor vehicle when such person while in possession of a firearm or weapon obtains a motor vehicle from the person or presence of another by force and violence or intimidation or attempts or conspires to do so.

(c) A person convicted of the offense of hijacking a motor vehicle shall be punished by imprisonment for not less than ten nor more than 20 years and a fine of not less than $10,000.00 nor more than $100,000.00, provided that any person who has previously committed an offense under the laws of the United States or of Georgia or of any of the several states or of any foreign nation recognized by the United States which if committed in Georgia would have constituted the offense of hijacking a motor vehicle shall be punished by imprisonment for life and a fine of not less than $100,000.00 nor more than $500,000.00. For purposes of this subsection, "state" shall include the District of Columbia and any territory, possession, or dominion of the United States.

(d) The offense of hijacking a motor vehicle shall be considered a separate offense and shall not merge with any other offense; and the punishment prescribed by subsection (c) of this Code section shall not be deferred, suspended, or probated.

(e)(1) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9. (Code 1981, § 16-5-44.1, enacted by Ga. L. 1994, p. 1625, § 3; Ga. L. 2014, p. 432, § 2-4/HB 826; Ga. L. 2015, p. 693, § 2-1/HB 233.)

The 2014 amendment, effective July 1, 2014, substituted "hazardous object by Code Section 20-2-751" for "weapon by Code Section 16-11-127.1" near the end of paragraph (a)(3).

The 2015 amendment, effective July 1, 2015, rewrote subsection (e), which read: "Any property which is used, intended for use, derived, or realized, directly or indirectly, from a violation of this Code section is forfeited to the state and no property interest shall exist therein. Any action declaring such forfeiture shall be governed by the provisions of Code Section 16-13-49." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall

apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

JUDICIAL DECISIONS

Conspiracy to hijack motor vehicle. — State did not have to prove the defendant had knowledge of the weapon to be convicted of felony murder, aggravated assault with a deadly weapon, armed robbery, hijacking a motor vehicle, possession of a firearm during a felony, conspiracy to commit armed robbery, and conspiracy to commit hijacking a motor vehicle. The evidence was sufficient to authorize a rational jury to find that the defendant conspired to rob the victims and murder was a reasonably foreseeable consequence of the conspiracy. Hicks v. State, 295 Ga. 268, 759 S.E.2d 509 (2014).

Evidence sufficient for conviction. Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed a hijacking, under O.C.G.A. § 16-5-44.1(b), because: (1) the statute included attempt as a means of committing the crime; and (2) the defendant's assertion of ownership of a victim's vehicle and the fact that the victim was pulled out of the vehicle constituted substantial steps toward committing the crime. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle and possessed the gun that the accomplice used in the crime. Gordon v. State, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of them of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-8-41(a), 16-5-44.1, 16-11-106.

Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Sufficient evidence supported the defendant's convictions for armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm because the evidence showed that the defendant was identified by the victim, the defendant was arrested about an hour and a half after the crimes occurred in the Lincoln Town car used during the commission of the crimes, which the defendant admitted belonged to the defendant, and the cell phone that the victim had reported stolen was found in the car in addition to guns matching the victim's description of the weapons used. Hinton v. State, 321 Ga. App. 445, 740 S.E.2d 394 (2013).

Evidence showing that the defendant opened the passenger door of a car, sat down, grabbed a woman's purse, told the woman to drive or die while pointing a sock covered object at the woman supported the defendant's conviction for hijacking a motor vehicle. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Evidence sufficient for attempt to hijack motor vehicle. — Given that a defendant repeatedly stabbed a victim in the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). Hickman v. State, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Jury instructions.

Defendant's trial counsel was not ineffective in failing to request a jury charge on hijacking a motor vehicle because under O.C.G.A. § 16-5-44.1(c) hijacking a motor vehicle was punishable by imprisonment for not less than ten nor more than 20 years, the same range as kidnapping. Therefore, the defendant could show no prejudice from the defendant's counsel's failure to request such a charge. Howard v. State, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

Cited in Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014).

16-5-45. Interference with custody.

(a) As used in this Code section, the term:

(1) "Child" means any individual who is under the age of 17 years or any individual who is under the age of 18 years who is alleged to be a dependent child or a child in need of services as such terms are defined in Code Section 15-11-2.

(2) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.

(3) "Lawful custody" means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-133, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.

(4) "Service provider" means an entity that is registered with the Department of Human Services pursuant to Article 7 of Chapter 5 of Title 49 or a child welfare agency as defined in Code Section 49-5-12 or an agent or employee acting on behalf of such entity or child welfare agency.

(b)(1) A person commits the offense of interference with custody when without lawful authority to do so, the person:

(A) Knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person;

(B) Knowingly harbors any child or committed person who has absconded; provided, however, that this subparagraph shall not apply to a service provider that notifies the child's parent, guardian, or legal custodian of the child's location and general state of well being as soon as possible but not later than 72 hours after the child's acceptance of services; provided, further, that such notification shall not be required if:

(i) The service provider has reasonable cause to believe that the minor has been abused or neglected and makes a child abuse report pursuant to Code Section 19-7-5;

(ii) The child will not disclose the name of the child's parent, guardian, or legal custodian, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(iii) The child's parent, guardian, or legal custodian cannot be reached, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(C) Intentionally and willfully retains possession within this state of the child or committed person upon the expiration of a lawful period of visitation with the child or committed person.

(2) A person convicted of the offense of interference with custody shall be punished as follows:

(A) Upon conviction of the first offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than $200.00 nor more than $500.00 or shall be imprisoned for not less than one month nor more than five months, or both fined and imprisoned;

(B) Upon conviction of the second offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than $400.00 nor more than $1,000.00 or shall be imprisoned for not less than three months nor more than 12 months, or both fined and imprisoned; and

(C) Upon the conviction of the third or subsequent offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c)(1) A person commits the offense of interstate interference with custody when without lawful authority to do so the person knowingly or recklessly takes or entices any minor or committed person away

from the individual who has lawful custody of such minor or committed person and in so doing brings such minor or committed person into this state or removes such minor or committed person from this state.

(2) A person also commits the offense of interstate interference with custody when the person removes a minor or committed person from this state in the lawful exercise of a visitation right and, upon the expiration of the period of lawful visitation, intentionally retains possession of the minor or committed person in another state for the purpose of keeping the minor or committed person away from the individual having lawful custody of the minor or committed person. The offense is deemed to be committed in the county to which the minor or committed person was to have been returned upon expiration of the period of lawful visitation.

(3) A person convicted of the offense of interstate interference with custody shall be guilty of a felony and shall be imprisoned for not less than one year nor more than five years. (Code 1933, § 26-1312, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 1420, § 1; Ga. L. 1982, p. 970, § 2; Ga. L. 1986, p. 1325, § 1; Ga. L. 1987, p. 561, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2000, p. 20, § 5; Ga. L. 2011, p. 470, § 2/SB 94; Ga. L. 2013, p. 294, § 4-7/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted "dependent child or a child in need of services" for "deprived child or an unruly child" in paragraph (a)(1); and substituted "Code Section 15-11-133" for "Code Section 15-11-45" in paragraph (a)(3). See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

JUDICIAL DECISIONS

Indictment sufficient to withstand general demurrer. — Indictment alleging that the defendant, without lawful authority, did entice a child from the child's legal custodian, contrary to the laws of Georgia, was sufficient although the indictment did not allege that the defendant "knowingly or recklessly enticed" the child, pursuant to O.C.G.A. § 16-5-45(b)(1)(A), because the use of the verb "entice" described an intentional act. State v. Wilson, 318 Ga. App. 88, 732 S.E.2d 330 (2012).

Registration as sex offender not required. — Trial court properly permanently enjoined the Georgia Department of Corrections from requiring the defendant to register as a sex offender because the defendant's State of Alabama conviction for interference with custody of a child was under Georgia law a misdemeanor conviction that did not trigger the

sex offender registration requirement. Owens v. Urbina, 296 Ga. 256, 765 S.E.2d 909 (2014).

Cited in In the Matter of Levin, 289 Ga. 170, 709 S.E.2d 808 (2011); Baker v. State, 316 Ga. App. 122, 728 S.E.2d 767 (2012); State v. Wilson, No. A12A1122, 2012 Ga. App. LEXIS 793 (Sept. 25, 2012); Carlson v. Carlson, 324 Ga. App. 214, 748 S.E.2d 304 (2013).

16-5-46. Trafficking of persons for labor or sexual servitude.

(a) As used in this Code section, the term:

(1) "Coercion" means:

(A) Causing or threatening to cause bodily harm to any person, physically restraining or confining any person, or threatening to physically restrain or confine any person;

(B) Exposing or threatening to expose any fact or information or disseminating or threatening to disseminate any fact or information that would tend to subject a person to criminal or immigration proceedings, hatred, contempt, or ridicule;

(C) Destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of any person;

(D) Providing a controlled substance, as such term is defined by Code Section 16-13-21, to such person for the purpose of compelling such person to engage in labor or sexual servitude against his or her will; or

(E) Causing or threatening to cause financial harm to any person or using financial control over any person.

(2) "Deception" means:

(A) Creating or confirming another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(B) Maintaining the status or condition of a person arising from a pledge by that person of his or her personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of such debt; or

(C) Promising benefits or the performance of services which the accused does not intend to deliver or perform or knows will not be delivered or performed. Evidence of failure to deliver benefits or

perform services standing alone shall not be sufficient to authorize a conviction under this Code section.

(3) "Labor servitude" means work or service of economic or financial value which is performed or provided by another person and is induced or obtained by coercion or deception.

(4) "Performance" shall have the same meaning as set forth in Code Section 16-12-100.

(5) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(6) "Sexual servitude" means:

(A) Any sexually explicit conduct or performance involving sexually explicit conduct for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or

(B) Any sexually explicit conduct or performance involving sexually explicit conduct which is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years.

(b) A person commits the offense of trafficking a person for labor servitude when that person knowingly subjects another person to or maintains another person in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude.

(c) A person commits the offense of trafficking a person for sexual servitude when that person knowingly subjects another person to or maintains another person in sexual servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of sexual servitude.

(d) The age of consent for sexual activity or the accused's lack of knowledge of the age of the person being trafficked shall not constitute a defense in a prosecution for a violation of this Code section.

(e) The sexual history or history of commercial sexual activity of a person alleged to have been trafficked or such person's connection by blood or marriage to an accused in the case or to anyone involved in such person's trafficking shall be excluded from evidence if the court finds at a hearing outside the presence of the jury that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

(f)(1) Except as provided in paragraph (2) of this subsection, any accused who commits the offense of trafficking a person for labor or sexual servitude shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years, a fine not to exceed $100,000.00, or both.

(2) Any accused who commits the offense of trafficking a person for labor or sexual servitude against a person who is under the age of 18 years shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than ten nor more than 20 years, a fine not to exceed $100,000.00, or both; provided, however, that if the offense is committed against a person under 18 years of age and such person under the age of 18 years was coerced or deceived into being trafficked for labor or sexual servitude, the accused shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than 25 nor more than 50 years or life imprisonment, a fine not to exceed $100,000.00, or both.

(g)(1) As used in this subsection, the terms "civil forfeiture proceedings," "proceeds," and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(4) The Attorney General shall be specifically authorized to commence civil forfeiture proceedings under this Code section.

(h) Prosecuting attorneys and the Attorney General shall have concurrent authority to prosecute any criminal cases arising under the provisions of this Code section and to perform any duty that necessarily appertains thereto.

(i) Each violation of this Code section shall constitute a separate offense and shall not merge with any other offense.

(j) A corporation may be prosecuted under this Code section for an act or omission constituting a crime under this Code section only if an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his or her office or employment and on behalf of the corporation and the commission of the crime was either authorized, requested, commanded, performed, or within the scope of his or her employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company

knew or should have known was occurring. (Code 1981, § 16-5-46, enacted by Ga. L. 2006, p. 105, § 3/SB 529; Ga. L. 2011, p. 217, § 1/HB 200; Ga. L. 2015, p. 693, § 2-2/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (g) for the former provisions, which read: "All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state. Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7. Prosecuting attorneys and the Attorney General may commence forfeiture proceedings under this Code section." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Based on evidence that the defendant kept the victim in a state of financial dependence, provided the victim with drugs and alcohol to keep the victim compliant, and the defendant told the victim the defendant needed money to keep the defendant out of jail, the jury could infer that the defendant used coercion and deception in an effort to overmaster the victim's will and compel the victim to engage in sexually explicit conduct. Lemery v. State, 330 Ga. App. 623, 768 S.E.2d 800 (2015).

16-5-47. Posting model notice with human trafficking hotline information in businesses and on Internet; termination.

(a) As used in this Code section, the term:

(1) "Adult entertainment establishment" means any place of business or commercial establishment wherein:

(A) The entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation;

(B) The patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments; or

(C) The patron directly or indirectly is charged a fee to engage in personal contact by employees, devices, or equipment, or by personnel provided by the establishment.

Such term shall include, but shall not be limited to, bathhouses, lingerie modeling studios, and related or similar activities. Such term shall not include businesses or commercial establishments which have as their sole purpose the improvement of health and physical fitness through special equipment and facilities, rather than entertainment.

(2) "Agricultural products" means raising, growing, harvesting, or storing of crops; feeding, breeding, or managing livestock, equine, or poultry; producing or storing feed for use in the production of livestock, including, but not limited to, cattle, calves, swine, hogs, goats, sheep, equine, and rabbits, or for use in the production of poultry, including, but not limited to, chickens, hens, ratites, and turkeys; producing plants, trees, Christmas trees, fowl, equine, or animals; or the production of aquacultural, horticultural, viticultural, silvicultural, grass sod, dairy, livestock, poultry, egg, and apiarian products.

(3) "Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.

(4) "Day hauler" means any person who is employed by a farm labor contractor to transport, or who for a fee transports, by motor vehicle, workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person; provided, however, that such term shall not include a person who produces agricultural products.

(5) "Farm labor contractor" means any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons; provided, however, that such term shall not include a person who produces agricultural products.

(6) "Hotel" means any hotel, inn, or other establishment which offers overnight accommodations to the public for hire.

(7) "Massage therapist" means a person licensed pursuant to Chapter 24A of Title 43.

(8) "Primary airport" shall have the same meaning as set forth in 49 U.S.C. Section 47102(16).

(9) "Substantially nude" means dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva, or genitals.

(10) "Truck stop" means a privately owned and operated facility that provides food, fuel, shower or other sanitary facilities, and lawful overnight truck parking.

(b) Effective September 15, 2013, the following businesses and other establishments shall post the notice described in subsection (c) of this Code section, or a substantially similar notice, in English, Spanish, and any other language deemed appropriate by the director of the Georgia Bureau of Investigation, in each public restroom for the business or establishment and either in a conspicuous place near the public entrance of the business or establishment or in another conspicuous location in clear view of the public and employees where similar notices are customarily posted:

(1) Adult entertainment establishments;

(2) Bars;

(3) Primary airports;

(4) Passenger rail or light rail stations;

(5) Bus stations;

(6) Truck stops;

(7) Emergency rooms within general acute care hospitals;

(8) Urgent care centers;

(9) Farm labor contractors and day haulers;

(10) Privately operated job recruitment centers;

(11) Safety rest areas located along interstate highways in this state;

(12) Hotels; and

(13) Businesses and establishments that offer massage or body-work services by a person who is not a massage therapist.

(c) On or before August 1, 2013, the Georgia Bureau of Investigation shall develop a model notice that complies with the requirements of this subsection and make the model notice available for download on its Internet website. Such notice shall be at least 8 1/2 inches by 11 inches in size, printed in a 16 point font in English, Spanish, and any other language deemed appropriate by the director of the Georgia Bureau of Investigation, and state the following:

"Are you or someone you know being sold for sex or made/forced to work for little or no pay and cannot leave? Call the National Human Trafficking Resource Center at 1-888-373-7888 for help. All victims of slavery and human trafficking have rights and are protected by international, federal, and state law.

The hotline is:

(1) Anonymous and confidential;

(2) Available 24 hours a day, seven days a week;

(3) Able to provide help, referral to services, training, and general information;

(4) Accessible in 170 languages;

(5) Operated by a nonprofit, nongovernmental organization; and

(6) Toll free."

(d) A law enforcement officer shall notify, in writing, any business or establishment that has failed to comply with this Code section that it has failed to comply with the requirements of this Code section and if it does not correct the violation within 30 days from the date of receipt of the notice, the owner of such business or establishment shall be charged with a violation of this Code section and upon conviction shall be guilty of the misdemeanor offense of failure to post the National Human Trafficking Resource Center hotline number and may be punished by a fine of not more than $500.00; but the provisions of Chapter 11 of Title 17 and any other provision of law to the contrary notwithstanding, the costs of such prosecution shall not be taxed nor shall any additional penalty, fee, or surcharge to a fine for such offense be assessed against an owner for conviction thereof. Upon a second or subsequent conviction, the owner shall be guilty of a high and aggravated misdemeanor and shall be punished by a fine not to exceed $5,000.00. The notice required by this subsection may be hand delivered to the noncomplying business or establishment or mailed to it at the address of such business or establishment.

(e) This Code section shall be repealed in its entirety on January 1, 2019, unless extended by an Act of the General Assembly. (Code 1981, § 16-5-47, enacted by Ga. L. 2013, p. 620, § 1/HB 141.)

Effective date. — This Code section became effective May 6, 2013.

Law reviews. — For article on the 2013 enactment of this Code section, see 30 Ga. St. U.L. Rev. 119 (2013).

ARTICLE 4

RECKLESS CONDUCT

16-5-60. Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons.

Cross references. — Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603. Disclosure of AIDS confidential information, § 24-12-21.

JUDICIAL DECISIONS

Reckless conduct charge not warranted when firing of gun was not negligent. — Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b) was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. Tiller v. State, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Running over victim.

Evidence was insufficient to convict the defendant because the state did not show that the defendant's conduct while the two children were under the defendant's supervision constituted criminal negligence supporting the defendant's convictions for second degree cruelty to children and for reckless conduct related to the drowning deaths of the two children as it could not be said that taking a 45-minute phone call in itself constituted a failure to reasonably supervise the children; the defendant confirmed that the children were in an upstairs room playing when the defendant initiated the phone call; and the defendant had told the children they could not go swimming and there was no showing that the children had a propensity to disobey the defendant. Corvi v. State, 296 Ga. 557, 769 S.E.2d 388 (2015).

Merger with aggravated battery.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery required showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. DeLeon v. State, 289 Ga. 782, 716 S.E.2d 173 (2011).

Verdicts for malice murder and other intent crimes were mutually exclusive of reckless conduct verdict. — Appellant's convictions for malice murder, felony murder, aggravated assault, battery, and simple battery were reversed because the verdicts were mutually exclusive of the verdict on reckless conduct, as the former required the jury to find criminal intent and the verdict on reckless conduct required only a finding of criminal negligence and all the verdicts involved the same act by the accused as to the same victim at the same instance of time. Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

Jury instructions.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided

evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

Defendant was not entitled to a jury charge on the misdemeanors of reckless conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because, although the defendant relied upon evidence that the defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Trial court did not commit reversible error in failing to give, sua sponte, a jury charge on justification because there was no evidence to support such a charge; contrary to the defendant's assertions in the defendant's brief, at no time did the defendant testify that the defendant accelerated to 103 mph because the defendant had no safer option. Jones v. State, 315 Ga. App. 688, 727 S.E.2d 512 (2012).

Refusal to instruct on reckless conduct. — Trial court did not err when the court refused to charge the jury on simple assault and reckless conduct as lesser included offenses of aggravated assault because the defendant failed to raise a question of fact as to whether the defendant assaulted the victim with a gun and there was no evidence suggesting that the gun went off accidentally. Johnson v. State, 320 Ga. App. 161, 739 S.E.2d 469 (2013).

Failure to include reckless conduct in verdict form. — Trial court did not err by failing to include reckless conduct on the verdict form as a lesser-included offense of felony murder because a separate reckless conduct option was not required to be on the verdict form since there was no evidence of reckless conduct other than that which directly related to the death of the victim, thus, the reckless conduct charge had to be in the context of involuntary manslaughter. Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014).

Cited in Mathis v. State, 293 Ga. 35, 743 S.E.2d 393 (2013).

16-5-61. Hazing.

Law reviews. — For comment, "'Am I My Brother's Keeper?,': Reforming Criminal Hazing Laws Based on Assumption of Care," see 63 Emory L. J. 925 (2014)

ARTICLE 5

CRUELTY TO CHILDREN

16-5-70. Cruelty to children.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Specifying specific date in indictment not required. — In a child abuse case, trial counsel was not ineffective for failing to file a special demurrer to establish the date of the crime as a material allegation of the indictment because the exact date was not a material allegation of the indictment and the evidence showed that the victim was beaten by the defendant on October 2, 2008, and that the co-defendant beat the victim with belts on other occasions, and other evidence showed that the victim's scars were a year old or less; therefore, the state proved that child cruelty occurred within the statute of limitation. Moore v. State, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

Evidence sufficient to support conviction. — Mother's conviction was affirmed because there was evidence from which the jury could infer that the mother was aware of the boyfriend's sexual abuse of her daughters but did not adequately intervene. The evidence was therefore sufficient to support the mother's convictions of cruelty to children in the first degree. Adorno v. State, 314 Ga. App. 509, 724 S.E.2d 816 (2012).

Motion to withdraw guilty plea. — Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012), overruled on other grounds.

Sentence proper. — Defendant failed to demonstrate that the defendant's sentence of ten years for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), and contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), were unlawful because the trial court found that the defendant's defense was based upon lies and asserted in bad faith; the sentences were within the statutory limits for each of the crimes for which the defendant was convicted pursuant to O.C.G.A. §§ 16-5-70(e)(2) and 16-12-1(b). Staib v. State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Probation revocation for cruelty to children. — Defendant's probation was properly revoked as the defendant committed the offense of cruelty to children by maliciously causing the defendant's own daughter cruel or excessive physical or mental pain because the evidence showed that, when the defendant's daughter was four and five years old, the defendant frequently disciplined the child by whipping the child's arms and back with a belt or stick and then locking the child in a dark closet for up to 10 minutes; the child was afraid of the dark and would beat on the closet door and scream and cry to be released from the closet; and, when the child was six, the child attempted to commit suicide to avoid being hurt by the defendant anymore, and because the child was scared of the defendant. Haji v. State, 331 Ga. App. 116, 769 S.E.2d 811 (2015).

Rule of lenity did not apply. — Rule of lenity did not require that the defendant receive the lesser punishment for the two counts of cruelty to children against the defendant because, although the jury could have found the defendant guilty of the third degree of the offense, based on the violent attack the defendant waged against the adult victim in the child victims' presence, the evidence authorized the jury to find the additional element required for the second degree of the offense, that is, that the defendant's conduct caused the child victims to suffer cruel and excessive mental pain as alleged in the indictment; consequently, the rule of lenity did not require that the defendant be punished only for the third degree of the offense. White v. State, 319 Ga. App.

530, 737 S.E.2d 324 (2013).

Inconsistent verdicts not found. — In a felony murder case involving cruelty to a child, the defendant's convictions for involuntary manslaughter based on simple battery were affirmed because the predicate offense for involuntary manslaughter was simple battery and the intent element of simple battery was not at all logically inconsistent with the mens rea required for the greater offense of aggravated assault, aggravated battery, or cruelty to children; therefore, the verdicts were not inconsistent. Griffin v. State, 296 Ga. 415, 768 S.E.2d 515 (2015).

Cited in Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012); Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Application

Whipping of child.

Evidence that a six-year-old victim was spending the night at the defendant's house when the defendant became angry because the victim broke a pair of glasses and whipped the victim with a telephone cord, leaving wounds on the victim's back, buttocks, thighs, and groin, was sufficient to support defendant's conviction of first-degree child cruelty in violation of O.C.G.A. § 16-5-70. Chambers v. State, 313 Ga. App. 39, 720 S.E.2d 358 (2011).

Murder of mother in front of child.

There was sufficient evidence to support the defendant's conviction for third-degree child cruelty based on the evidence adduced at trial that the defendant beat and stabbed the defendant's spouse in front of the defendant's children and other witnesses. Dunn v. State, 292 Ga. 359, 736 S.E.2d 392 (2013).

Cruel and excessive mental pain.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree because there was more than sufficient evidence from which the jury could infer that the defendant's children had suffered cruel and excessive mental pain as a result of the patently unhealthy, filthy, and dangerous conditions in which the children were forced to live; the state presented overwhelming evidence of the filthy and neglected conditions of the children, the children's significant developmental delays, one child's confinement to a urine and feces-stained crib without a diaper, and the fact that another child was locked in a urine-soiled bedroom without access to a toilet. Staib v. State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Evidence was sufficient to convict the defendant of cruelty to children in the second degree because the jury was authorized to conclude that the presence of an unembalmed corpse in the minor children's home for nearly three days was a criminally negligent act constituting an unsanitary condition and to infer from the reaction of the police officers that the resulting stench caused the children excessive mental pain; neither an incomplete understanding by the children nor an absence of physical symptoms, such as vomiting, would preclude the internal experience of excessive mental pain. Walden v. State, 289 Ga. 845, 717 S.E.2d 159 (2011).

Cruel or excessive physical or mental pain.

Sufficient evidence supported the defendant's cruelty to children convictions because, although the evidence did not show that the defendant had personally caused the bone fractures on the child, the evidence authorized findings that multiple bone fractures were being inflicted upon the young child over the course of about 13 months, that caused the child manifest physical pain, that defendant was aware of the bone fractures while in defendant's care or the father's care, and failed to intervene. Morast v. State, 323 Ga. App. 808, 748 S.E.2d 287 (2013).

Denial of necessary and appropriate medical care, etc.

Failure to seek timely medical care for a child may form the basis for the offense of cruelty to children. Morast v. State, 323 Ga. App. 808, 748 S.E.2d 287 (2013).

Sufficient evidence supported the defendant's cruelty to children convictions based on being criminally negligent in failing to seek medical care for the defendant's child after the child was bitten by a dog and a human and suffered excessive vomiting, and the defendant knew for several days but did not seek medical attention for the child. Morast v. State, 323 Ga. App. 808, 748 S.E.2d 287 (2013).

Application (Cont'd)

Failure to procure medical treatment.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), because after the victim sustained second and third degree burns, the defendant failed to seek immediate treatment for the victim, and the defendant also prevented the victim's mother from taking the victim to the hospital for treatment; during the delay in which appropriate medical treatment was withheld, the victim had difficulty eating and sleeping, became dehydrated, and developed an infection in the area of the burns. Wells v. State, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Malnutrition.

Evidence was sufficient to support a father's malice murder conviction and a mother's conviction of felony murder during first-degree child cruelty under O.C.G.A. § 16-5-70(a) since extensive medical testimony showed their baby's need of medical attention and the baby's condition of extreme malnourishment or starvation causing death. Sanders v. State, 289 Ga. 655, 715 S.E.2d 124 (2011).

Drowning deaths of children. — Evidence was insufficient to convict the defendant because the state did not show that the defendant's conduct while the two children were under the defendant's supervision constituted criminal negligence supporting the defendant's convictions for second degree cruelty to children and for reckless conduct related to the drowning deaths of the two children as it could not be said that taking a 45-minute phone call in itself constituted a failure to reasonably supervise the children; the defendant confirmed that the children were in an upstairs room playing when the defendant initiated the phone call; and the defendant had told the children they could not go swimming and there was no showing that the children had a propensity to disobey the defendant. Corvi v. State, 296 Ga. 557, 769 S.E.2d 388 (2015).

Felony murder conviction upheld.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

Conviction for felony murder predicated on cruelty to children in the first degree was supported by evidence concerning the severity and scope of the victim's injuries, which permitted an inference that whoever struck the victim, an act to which the defendant admitted, did so maliciously and that the injuries were not the result of reasonable disciplinary measures as alleged by the defendant. Butler v. State, 292 Ga. 400, 738 S.E.2d 74 (2013).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), because the evidence authorized a finding that the defendant acted with the requisite criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim's body; the state's expert testified that the victim's burns were inconsistent with the defendant's claim that the incident leading to the victim's injuries was merely accidental. Wells v. State, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and

punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. Jackson v. State, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

There was sufficient evidence to support the defendant's conviction for child molestation, aggravated child molestation, and first degree cruelty to children with regard to the defendant's girlfriend's niece based on the testimony of the victim and similar transaction evidence involving the defendant's older daughter. Royal v. State, 319 Ga. App. 466, 735 S.E.2d 793 (2012).

Sufficient evidence existed to support the defendant's conviction for cruelty to children because, despite the defendant's contention to the contrary, the evidence was not undisputed that the two-year-old victim was asleep throughout the assault of the child's mother because the mother testified that the two-year-old was shaking just after the mother called 9-1-1, and O.C.G.A. § 16-5-70(c) does not expressly require that the child victim's cruel or excessive physical or mental pain arise immediately upon the defendant's act of criminal negligence. White v. State, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

When the victim described the defendant's abuse to the jury and in a recorded forensic interview that was played for the jury, and the victim included details that the forensic interviewer found inconsistent with someone who had been coached, the victim's testimony and the forensic interview supported the defendant's convictions for aggravated child molestation, child molestation, and first degree cruelty to children. Worley v. State, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

Sufficient direct evidence existed to sustain the defendant's conviction for cruelty to children in the first degree based on the testimony of the child victim, who indicated that it was the defendant, not the victim's biological father, who inflicted the injuries; in addition, the victim's biological father was incarcerated out-of-state at the time the injuries were sustained. Moore v. State, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

Evidence that the baby had been in the defendant's care for more than two hours when the baby died; that in the medical examiner's opinion, the baby would have died within minutes or hours of suffering a brain injury; and that the autopsy uncovered extensive internal injuries to the baby was sufficient to support the defendant's convictions for cruelty to children, aggravated assault, and aggravated battery. Graham v. State, 320 Ga. App. 714, 740 S.E.2d 649 (2013).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Sufficient evidence supported the defendant's convictions for aggravated battery, aggravated assault, and cruelty to children with regard to the skull fracture and other head injuries incurred by the defendant's infant son because the expert testimony and medical evidence established that the child's injuries were not accidental but caused by a blow to the head and

Application (Cont'd)

severe trauma. Oliver v. State, 324 Ga. App. 53, 748 S.E.2d 510 (2013).

Evidence was sufficient to sustain the defendant's first-degree child cruelty convictions because the defendant was an accomplice in the malice murder of the victim, which was witnessed by all three children, who were under the victim's care at the time and all three children testified at trial to their fright and angst during and immediately after the shooting. Oliphant v. State, 295 Ga. 597, 759 S.E.2d 821 (2014).

Evidence was sufficient to find the defendant guilty of two counts of cruelty to children in the first degree because the evidence was sufficient for the jury to conclude that the pain suffered by the children was cruel and excessive as the evidence showed that the defendant repeatedly and frequently shot the children with airsoft pistols and an airsoft rifle as a form of discipline; that the pellets left welts on the children and some of pellets caused broken skin; that both children testified that the pellets caused them pain and made them cry; and that the use of the airsoft gun to discipline the children was unreasonable discipline. Pritchett v. State, 327 Ga. App. 389, 759 S.E.2d 300 (2014).

Failure to intervene supported conviction. — Given the evidence that the defendant stood by and failed to intervene while the child victim's mother repeatedly struck the crying three-year-old child with a tree branch, inflicting multiple injuries, the jury was authorized to conclude that the defendant had failed to intervene to prevent the injuries, thereby demonstrating a wilful, wanton, or reckless disregard for the child's safety as required to support the defendant's conviction for cruelty to a child in the second degree in violation of O.C.G.A. § 16-5-70(c). Pierre-Louis v. State, 329 Ga. App. 55, 763 S.E.2d 513 (2014).

Party to crime of cruelty to children. — Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. Tabb v. State, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act, O.C.G.A. § 42-8-65(c), when the legislature enacted the State-Wide Probation Act, O.C.G.A. § 42-8-35.4. Mason v. State, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

Child hearsay. — Court of appeals properly held that the children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the court did not err in declining to extend the holding of Woodard v. State, 269 Ga. 317 (1998), which was overruled to the defendant's case; the defendant was convicted of first-degree child cruelty for causing cruel mental pain to the victims, yet the defendant made no claim that O.C.G.A. § 16-5-70(b) violated equal protection because the statute did not prohibit the same conduct toward an adult. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012) (O.C.G.A. § 24-8-820 eliminated the portion of the 1995 amendment to former § 24-3-16 which was held unconstitutional in Woodard v. State).

Merger with Other Offenses

Conviction for cruelty to children merged with felony murder.

Defendant's conviction for cruelty to children had to be vacated because the felony murder of which the defendant was convicted was premised on cruelty to a child; thus, the predicate offense merged into the murder as a matter of law. Jones v. State, 292 Ga. 593, 740 S.E.2d 147 (2013).

Cruelty to children and child molestation do not merge. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). Chandler v. State, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

No merger with reckless driving. — Trial court properly did not merge the appellant's convictions for cruelty to children in the second degree and serious injury by vehicle by the act of reckless driving with respect to the same victim for the purpose of sentencing because each offense required proof of a different wrongful act as the cruelty to children conviction required proof of facts not required by the serious injury by vehicle conviction and vice versa. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751 (2015).

Deprivation of minor conviction did not merge with cruelty to children conviction. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. Staib v. State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Jury Issues and Instructions

Sufficiency of charge.

Trial counsel was not ineffective for failing to object to the trial court's jury charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant's conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court's jury charge on justifiable parental discipline would have lacked merit. Tabb v. State, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Failure to charge on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming arguendo that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. Sears v. State, 290 Ga. 1, 717 S.E.2d 453 (2011).

Failure to charge on simple battery.

Trial court did not err in failing to charge the jury on simple battery, O.C.G.A. § 16-5-23, as a lesser included offense of cruelty to a child in the first degree, O.C.G.A. § 16-5-70(b), because

Jury Issues and Instructions (Cont'd)

the evidence did not authorize such a charge; if the jury believed that an accident occurred, no battery was committed, but if the jury accepted the state's evidence, then the jury was authorized to find that the defendant intentionally assaulted the victim, thereby maliciously causing the victim cruel and excessive physical pain. Furthermore, there was no written request to charge on simple battery in the record. Elrod v. State, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

16-5-73. Prohibition against presence of children during manufacture of methamphetamine; punishment.

JUDICIAL DECISIONS

Reversal warranted. — While there was sufficient evidence that the defendant permitted the child to be present where methamphetamine was being manufactured by the defendant's mother, the defendant was entitled to reversal of that conviction, because defense counsel was ineffective in failing to object when the State presented evidence of the defendant's alleged participation in a pill ring as a similar transaction. Hutchins v. State, 326 Ga. App. 250, 756 S.E.2d 347 (2014).

ARTICLE 6

FETICIDE

16-5-80. Feticide; voluntary manslaughter of an unborn child; penalties.

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. Platt v. State, 291 Ga. 631, 732 S.E.2d 75 (2012).

Fleeing and alluding police as basis for feticide charge. — Evidence was sufficient to support a finding that the appellant was a party to the act of fleeing and attempting to allude a police officer; consequently, since the evidence was sufficient for the jury to find the appellant guilty of the underlying felony on which the two felony murder counts were based, the element of fleeing and attempting to allude a police officer as charged in the feticide count was also established. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751 (2015).

ARTICLE 7

STALKING

16-5-90. Stalking; psychological evaluation.

JUDICIAL DECISIONS

"Surveillance" defined. — Although O.C.G.A. § 16-5-90(a) failed to define the term "surveillance," the term was readily understood by people of ordinary intelligence as meaning a close watch kept over someone or something. Accordingly, the indictment put defendant on notice that driving to, parking at, and sitting outside the victim's residence constituted "surveillance." Jones v. State, 310 Ga. App. 705, 713 S.E.2d 895 (2011).

Attempt to commit stalking a crime.

Under the precedents existing at the time of a petitioner's first habeas petition, a claim that the petitioner could not be convicted of aggravated stalking based solely on a single violation of a protective order could have been raised based on the language of O.C.G.A. §§ 16-5-90(a)(1) and 16-5-91(a); therefore, the petitioner's second petition was barred by O.C.G.A. § 9-14-51. State v. Cusack, 296 Ga. 534, 769 S.E.2d 370 (2015).

Evidence sufficient for conviction.

Sufficient evidence supported the defendant's conviction for aggravated stalking based on the defendant going to the victim's home uninvited and then physically attacking the victim when the victim refused the defendant's admittance to the victim's home, which followed several other incidents of unwanted contact. Gates v. State, 322 Ga. App. 383, 750 S.E.2d 683 (2013).

Evidence insufficient for conviction.

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary "pattern" of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing nature, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. Ramsey v. Middleton, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Defendant's conviction for aggravated stalking was reversed because the state failed to prove that there was actual contact with the victim, whether through a third party or otherwise, because the purported contact was a letter written by the defendant and given to the victim's attorney at the district attorney's office; thus, there was no evidence that the defendant contacted the victim at a place occupied by the victim. Seibert v. State, 321 Ga. App. 243, 739 S.E.2d 91 (2013).

Evidence insufficient for protective order.

Trial court abused the court's discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor's own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. Martin v. Woodyard, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

Cited in Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012); Elgin v. Swann, 315 Ga. App. 809, 728 S.E.2d 328 (2012); Edgecomb v. State, 319 Ga. App. 804, 738 S.E.2d 645 (2013); Crumity v. State, 321 Ga. App. 768, 743 S.E.2d 455 (2013).

16-5-91. Aggravated stalking.

JUDICIAL DECISIONS

Aggravating stalking based on single violation of protective order. — Under the precedents existing at the time of a petitioner's first habeas petition, a claim that the petitioner could not be convicted of aggravated stalking based solely on a single violation of a protective order could have been raised based on the language of O.C.G.A. §§ 16-5-90(a)(1) and 16-5-91(a); therefore, the petitioner's second petition was barred by O.C.G.A. § 9-14-51. State v. Cusack, 296 Ga. 534, 769 S.E.2d 370 (2015).

Molestation allegations not relevant. — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defendant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Evidence cumulative of defendant's testimony. — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that the witness's testimony was relevant to the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Each text was separate violation. — Convictions for aggravated stalking did not merge as each text the defendant sent to the victim was a separate violation or unit of prosecution. Nosratifard v. State, 320 Ga. App. 564, 740 S.E.2d 290 (2013).

Evidence sufficient for conviction. As the evidence showed that the defendant was prohibited from contacting a victim due to a protective order, that the defendant violated that order, and that the defendant's contact was for the purposes of harassing and intimidating the victim, the evidence was sufficient to support the defendant's conviction for aggravated stalking in violation of O.C.G.A. § 16-5-91(a). Herbert v. State, 311 Ga. App. 396, 715 S.E.2d 795 (2011).

Jury was authorized to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because the victim testified that the defendant had previously threatened the victim, the defendant had a history of violence against the victim, and the defendant made repeated phone calls and sent several text messages to the victim; while the defendant denied at trial that the defendant called the victim, the jury was free to reject that testimony and believe that of the victim, and the defendant did not deny sending text messages to the victim after the defendant's release from jail. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Evidence of harassing texts the defendant sent combined with the defendant's other threatening behavior and the victim's testimony that the victim felt compelled to undertake security measures to feel safe was sufficient to support the defendant's convictions for aggravated stalking. Nosratifard v. State, 320 Ga. App. 564, 740 S.E.2d 290 (2013).

Aggravated stalking conviction was supported by sufficient evidence as the jury was authorized to find a pattern of harassing and intimidating behavior based on recent contacts and telephone calls the defendant made to the victim. Crumity v. State, 321 Ga. App. 768, 743 S.E.2d 455 (2013).

Sufficient evidence supported the defendant's conviction for aggravated stalking based on the defendant going to the victim's home uninvited and then physically attacking the victim when the victim re-

fused the defendant's admittance to the victim's home, which followed several other incidents of unwanted contact. Gates v. State, 322 Ga. App. 383, 750 S.E.2d 683 (2013).

Conviction for aggravated stalking was supported by evidence that, in violation of a protection order, on a single day, the defendant called the victim, appeared at the victim's home, knocked on the victim's door, yelled and screamed at the victim, demanded that the victim let the defendant inside the victim's house, and refused to leave the victim's property. Oliver v. State, 325 Ga. App. 649, 753 S.E.2d 468 (2014).

Evidence that the defendant previously harassed the victim, destroyed property at the victim's residence, and returned to the residence after being served with an order barring the defendant from doing so, supported the aggravated stalking conviction. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

Evidence insufficient for conviction.

Insufficient evidence supported the defendant's aggravated stalking conviction because a divorce court order on which the prosecution relied merely barred the defendant from the home the defendant had shared with the victim, rather than prohibiting the defendant from having contact with the victim, so the order did not "in effect" prohibit the defendant from engaging in conduct that was prohibited by the statute. Keaton v. State, 311 Ga. App. 14, 714 S.E.2d 693 (2011).

Defendant's conviction for aggravated stalking was reversed because the state failed to prove that there was actual contact with the victim, whether through a third party or otherwise, because the purported contact was a letter written by the defendant and given to the victim's attorney at the district attorney's office; thus, there was no evidence that the defendant contacted the victim at a place occupied by the victim. Seibert v. State, 321 Ga. App. 243, 739 S.E.2d 91 (2013).

Evidence that the victim moved to another county and did not provide the defendant with the victim's address or inform the defendant of the victim's place of employment, but that the defendant located the victim, began threatening the victim, went to the victim's place of work and remained there until the defendant's presence was known, and vandalized the victim's car was sufficient to support the defendant's conviction for aggravated stalking. Crapps v. State, 329 Ga. App. 820, 766 S.E.2d 178 (2014).

Motion to sever murder and aggravated stalking denied. — Trial court properly exercised the court's discretion in denying the defendant's motion to sever the count of the indictment charging aggravated stalking from the counts relating to murder because evidence of the stalking offense would be admissible in a separate murder trial; evidence of the defendant's turbulent relationship with the stalking victim and the stalking of that victim was relevant to explain the defendant's animosity for the murder victim and the defendant's motive for the fatal attack. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

Jury instruction on harassing phone calls and violation of temporary protective order not warranted. — Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Jury instruction on family violence protective order violation erroneous. — Defendant's conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. Edgecomb v. State, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

Rule of lenity. — Defendant was not entitled to a sentence reduction because the aggravated assault and aggravated

stalking statutes did not define the same offense and did not address the same criminal conduct, the former offense addressing assault with an object likely to result in serious bodily injury and the latter offense addressing harassment and intimidation of a victim. Myrick v. State, 325 Ga. App. 607, 754 S.E.2d 395 (2014).

16-5-94. Restraining orders; protective orders.

Law reviews. — For comment, "Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause," see 60 Emory L.J. 1011 (2011).

JUDICIAL DECISIONS

Protective order upheld.

Trial court did not abuse its discretion in granting applicant a stalking protective order under O.C.G.A. § 16-5-94(d) against a neighbor. The neighbor placed applicant, applicant's wife, and applicant's stepchild under surveillance, contacting them for the purpose of harassing and intimidating them over a three-week period by screaming physical threats and taking pictures of applicant's family from the road while they were on their front porch. The neighbor also swerved her vehicle at the applicant's stepchild in a manner that forced the stepchild's vehicle partially off the road. Elgin v. Swann, 315 Ga. App. 809, 728 S.E.2d 328 (2012).

Evidence insufficient for protective order.

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary "pattern" of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing nature, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. Ramsey v. Middleton, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Trial court abused the court's discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor's own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. Martin v. Woodyard, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

Expiration of temporary order. — Temporary protective order (TPO) issued under O.C.G.A. § 16-5-94 stood dismissed as a matter of law after 30 days without a hearing pursuant to O.C.G.A. § 19-13-3(c); after that date, the superior court lacked the power to enforce the TPO, as provided in O.C.G.A. § 19-13-4(d), or order the parties to comply with a settlement agreement. Although the parties allegedly agreed to continue the hearing, there was no showing in the record of such consent. Peebles v. Claxton, 326 Ga. App. 53, 755 S.E.2d 861 (2014).

Jury instruction erroneous. — Defendant's conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. Edgecomb v. State, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

16-5-95. Offense of violating family violence order; penalty.

(a) As used in this Code section, the term:

(1) "Civil family violence order" means any temporary protective order or permanent protective order issued pursuant to Article 1 of Chapter 13 of Title 19.

(2) "Criminal family violence order" means:

(A) Any order of pretrial release issued as a result of an arrest for an act of family violence; or

(B) Any order for probation issued as a result of a conviction or plea of guilty, nolo contendere, or first offender to an act of family violence.

(3) "Family violence" shall have the same meaning as set forth in Code Section 19-13-1.

(b) A person commits the offense of violating a civil family violence order or criminal family violence order when such person knowingly and in a nonviolent manner violates the terms of such order issued against that person, which:

(1) Excludes, evicts, or excludes and evicts the person from a residence or household;

(2) Directs the person to stay away from a residence, workplace, or school;

(3) Restrains the person from approaching within a specified distance of another person; or

(4) Restricts the person from having any contact, direct or indirect, by telephone, pager, facsimile, e-mail, or any other means of communication with another person, except as specified in such order.

(c) Any person convicted of a violation of subsection (b) of this Code section shall be guilty of a misdemeanor.

(d) Nothing contained in this Code section shall prohibit a prosecution for the offense of stalking or aggravated stalking that arose out of the same course of conduct; provided, however, that, for purposes of sentencing, a violation of this Code section shall be merged with a violation of any provision of Code Section 16-5-90 or 16-5-91 that arose out of the same course of conduct. (Code 1981, § 16-5-95, enacted by Ga. L. 2003, p. 652, § 1; Ga. L. 2013, p. 667, § 1/SB 86.)

The 2013 amendment, effective May 6, 2013, added subsection (a); redesignated former subsections (a) through (c) as present subsections (b) through (d), respectively; in subsection (b), rewrote the introductory paragraph and substituted "such order" for "the order" at the end of paragraph (b)(4); and substituted "subsection (b)" for "subsection (a)" in subsection (c).

JUDICIAL DECISIONS

Jury instruction erroneous. — Defendant's conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. Edgecomb v. State, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

Instruction properly denied. — Because there was no evidence that could have shown that the defendant violated the protective order, but nonviolently, the evidence either showed the defendant committed aggravated stalking or no offense; the defendant was not entitled to a jury instruction on violation of a temporary protective order as a lesser included offense of aggravated stalking. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

ARTICLE 8

PROTECTION OF ELDER PERSONS

16-5-100. Definitions.

As used in this article, the term:

(1) "Alzheimer's disease" means a progressive, degenerative disease or condition that attacks the brain and results in impaired memory, thinking, and behavior.

(2) "Dementia" means:

(A) An irreversible global loss of cognitive function causing evident intellectual impairment which always includes memory loss, without alteration of state of consciousness, as diagnosed by a physician, and is severe enough to interfere with work or social activities, or both, and to require at least intermittent care or supervision; or

(B) The comatose state of an adult resulting from any head injury.

(3) "Disabled adult" means a person 18 years of age or older who is mentally or physically incapacitated or has Alzheimer's disease or dementia.

(4) "Elder person" means a person 65 years of age or older.

(5) "Essential services" means social, medical, psychiatric, or legal services necessary to safeguard a disabled adult's, elder person's, or resident's rights and resources and to maintain the physical and mental well-being of such person. Such services may include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, and protection from health and safety hazards.

(6) "Exploit" means illegally or improperly using a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another person's profit or advantage.

(7) "Long-term care facility" means any skilled nursing facility, intermediate care home, assisted living community, community living arrangement, or personal care home subject to regulation and licensure by the Department of Community Health.

(7.1) "Mentally or physically incapacitated" means an impairment which substantially affects an individual's ability to:

(A) Provide personal protection;

(B) Provide necessities, including but not limited to food, shelter, clothing, medical, or other health care;

(C) Carry out the activities of daily living; or

(D) Manage his or her resources.

(8) "Resident" means any person who is receiving treatment or care in any long-term care facility.

(9) "Sexual abuse" means the coercion for the purpose of self-gratification by a guardian or other person supervising the welfare or having immediate charge, control, or custody of a disabled adult, elder person, or resident to engage in any of the following conduct:

(A) Lewd exhibition of the genitals or pubic area of any person;

(B) Flagellation or torture by or upon a person who is unclothed or partially unclothed;

(C) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is unclothed or partially clothed unless physical restraint is medically indicated;

(D) Physical contact in an act of sexual stimulation or gratification with any person's unclothed genitals, pubic area, or buttocks or with a female's nude breasts;

(E) Defecation or urination for the purpose of sexual stimulation of the viewer; or

(F) Penetration of the vagina or rectum by any object except when done as part of a recognized medical or nursing procedure. (Code 1981, § 16-5-100, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78; Ga. L. 2015, p. 598, § 1-1/HB 72.)

Effective date. — This Code section became effective July 1, 2013.

The 2015 amendment, effective July 1, 2015, added paragraph (7.1).

Editor's notes. — Ga. L. 2013, p. 524, § 1-1/HB 78, effective July 1, 2013, redesignated former Code Section 16-5-100 as present Code Section 16-5-101.

16-5-101. Neglect to a disabled adult, elder person, or resident.

(a) A guardian or other person supervising the welfare of or having immediate charge, control, or custody of a disabled adult, elder person, or resident commits the offense of neglect to a disabled adult, elder person, or resident when the person willfully deprives a disabled adult, elder person, or resident of health care, shelter, or necessary sustenance to the extent that the health or well-being of such person is jeopardized.

(b) The provisions of this Code section shall not apply to a physician nor any person acting under a physician's direction nor to a hospital, hospice, or long-term care facility, nor any agent or employee thereof who is in good faith acting within the scope of his or her employment or agency or who is acting in good faith in accordance with a living will, a durable power of attorney for health care, an advance directive for health care, a Physician Orders for Life-Sustaining Treatment form pursuant to Code Section 31-1-14, an order not to resuscitate, or the instructions of the patient or the patient's lawful surrogate decision maker, nor shall the provisions of this Code section require any physician, any institution licensed in accordance with Chapter 7 of Title 31, or any employee or agent thereof to provide essential services or shelter to any person in the absence of another legal obligation to do so.

(c) The provisions of this Code section shall not apply to a guardian or other person supervising the welfare of or having immediate charge, control, or custody of a disabled adult, elder person, or resident who in good faith provides treatment by spiritual means alone through prayer for the person's physical or mental condition, in lieu of medical treatment, in accordance with the practices of and written notarized consent of the person.

(d) A person who commits the offense of neglect to a disabled adult, elder person, or resident of a long-term care facility, upon conviction, shall be punished by imprisonment for not less than one nor more than 20 years, a fine of not more than $50,000.00, or both. (Code 1981, § 16-5-100, enacted by Ga. L. 2000, p. 1085, § 2; Ga. L. 2002, p. 648, § 1; Ga. L. 2007, p. 133, § 6/HB 24; Code 1981, § 16-5-101, as redesignated by Ga. L. 2013, p. 524, § 1-1/HB 78; Ga. L. 2015, p. 305, § 4/SB 109.)

The 2013 amendment, effective July 1, 2013, redesignated former Code Section 16-5-100 as present Code Section 16-5-101 and rewrote this Code section.

The 2015 amendment, effective July 1, 2015, inserted "a Physician Orders for Life-Sustaining Treatment form pursuant to Code Section 31-1-14," near the middle of subsection (b).

16-5-102. Exploitation and intimidation of disabled adults, elder persons, and residents; obstruction of investigation.

(a) Any person who knowingly and willfully exploits a disabled adult, elder person, or resident, willfully inflicts physical pain, physical injury, sexual abuse, mental anguish, or unreasonable confinement upon a disabled adult, elder person, or resident, or willfully deprives of essential services a disabled adult, elder person, or resident shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one nor more than 20 years, a fine of not more than $50,000.00, or both.

(b) Any person who threatens, intimidates, or attempts to intimidate a disabled adult, elder person, or resident who is the subject of a report made pursuant to Chapter 5 of Title 30 or Article 4 of Chapter 8 of Title 31, or any other person cooperating with an investigation conducted pursuant to this Code section, shall be guilty of a misdemeanor of a high and aggravated nature.

(c) Any person who willfully and knowingly obstructs or in any way impedes an investigation conducted pursuant to Chapter 5 of Title 30 or Article 4 of Chapter 8 of Title 31, upon conviction, shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-5-102, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78.)

Effective date. — This Code section became effective July 1, 2013.

16-5-103. Exceptions to criminal liability.

(a) An owner, officer, administrator, board member, employee, or agent of a long-term care facility shall not be held criminally liable for the actions of another person who is convicted pursuant to this article unless such owner, officer, administrator, board member, employee, or agent was a knowing and willful party to or conspirator to the abuse or neglect, as defined in Code Section 30-5-3, or exploitation of a disabled adult, elder person, or resident.

(b) A violation of this article shall not give rise to a private cause of action or civil remedies under subsection (b) or (c) of Code Section 16-14-6 against a long-term care facility or any owner, officer, employee, operator, or manager of such facility. Nothing in this subsection shall limit the criminal or civil remedies available to the state pursuant to state law. (Code 1981, § 16-5-103, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78; Ga. L. 2015, p. 598, § 1-2/HB 72.)

Effective date. — This Code section became effective July 1, 2013.

The 2015 amendment, effective July 1, 2015, designated the previously existing provisions of this Code section as subsection (a) and added subsection (b).

16-5-104. Venue.

For the purpose of venue under this article, any violation of this article shall be considered to have been committed:

(1) In any county in which any act was performed in furtherance of the violation; or

(2) In any county in which any alleged victim resides. (Code 1981, § 16-5-104, enacted by Ga. L. 2015, p. 598, § 1-3/HB 72.)

Effective date. — This Code section became effective July 1, 2015.

Editor's notes. — Ga. L. 2015, p. 598, § 1-3/HB 72, effective July 1, 2015, redesignated former Code Section 16-5-104 as present Code Section 16-5-105.

16-5-105. Applicability.

This article shall be cumulative and supplemental to any other law of this state. (Code 1981, § 16-5-104, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78; Code 1981, § 16-5-105, as redesignated by Ga. L. 2015, p. 598, § 1-3/HB 72.)

Effective date. — This Code section became effective July 1, 2013.

The 2015 amendment, effective July 1, 2015, redesignated former Code Section 16-5-104 as present Code Section 16-5-105.

CHAPTER 6

SEXUAL OFFENSES

16-6-1. Rape.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Venue sufficiently established. — Trial court did not err in denying the defendant's motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective's testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant's argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. Bizimana v. State, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Denial of defendant's motion for a directed verdict of acquittal, etc.

Defendant's complaint that the trial court erred in denying the defendant's motion for a directed verdict of acquittal as to the offense of forcible rape was rendered moot because the defendant was not found guilty of that offense. Beaudoin v. State, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Denial of severance upheld where similar modus operandi between crimes.

Trial court did not err in denying the defendant's motion to sever the charges of rape, aggravated assault, kidnapping with bodily injury, and aggravated sodomy arising out of three sexual assaults against three different women because the charges against the defendant clearly showed a recurring pattern of conduct suggesting a common scheme or modus operandi as the victims of the three sexual assaults were adult women who did not know the defendant, all three incidents occurred in DeKalb County within six months of each other, each victim was taken by vehicle to a secluded location before the victims were raped, all three incidents involved a handgun, and semen matching the defendant's DNA profile was found on each victim. Ray v. State, 329 Ga. App. 5, 763 S.E.2d 361 (2014).

Counsel not ineffective in rape trial. — Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, trial counsel was not ineffective in failing to investigate alternate sources of the victim's pregnancy and injuries because trial counsel testified that identifying an alternate sexual partner might have conflicted with the Rape Shield Statute; any sexual contact after the crime would not have been relevant to the victim's injuries and would have been highly prejudicial; and, in light of the victim's testimony, the victim's immediate outcry, and the evidence of male DNA found inside the victim and the victim's vaginal injury, it was not reasonably likely that the result of the trial would have been different. Davis v.

General Consideration (Cont'd)

State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

Cited in Burke v. State, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Merger and Other Offenses

No merger of aggravated assault with rape.

Aggravated assault and rape convictions did not merge because the assault was complete before the rape and involved a separate and distinct act of force outside that needed to accomplish the rape. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

Aggravated assault merged with rape.

Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. Smith v. State, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Jury Instructions

Charge as to state's burden of proof.

Trial court did not err in instructing the jury on the material elements of rape as the charge adequately differentiated between the elements of rape and the portion of the charge dealing with force precisely tracked the language previously used and accepted by the court. Gordon v. State, 327 Ga. App. 774, 761 S.E.2d 169 (2014).

Charge proper. — While the indictment alleged that the defendant had carnal knowledge of a child under 16 years of age and the jury charge stated that the defendant could be convicted of rape for having carnal knowledge of a female under 10 years of age, there was no error because the evidence supported a determination that the victim was under 10 and the defendant did not challenge the sufficiency of that evidence. Brown v. State, 315 Ga. App. 115, 726 S.E.2d 612 (2012), cert. denied, No. S12C1239, 2012 Ga. LEXIS 983 (Ga. 2012).

Defendant's claim that the trial court erred in charging the jury that the victim's testimony, even without more, was sufficient to sustain a rape conviction because the trial court failed to buttress the charge with an additional charge regarding the state's burden of proof failed because the charge given was a correct statement of the relevant law, provided the statutory definition of the crime, and stated that the state had to prove each element beyond a reasonable doubt. Pye v. State, 322 Ga. App. 125, 742 S.E.2d 770 (2013).

Requested charge on penetration given. — Given that the defendant's requested charge on penetration was given, the defendant failed to demonstrate how the trial court's penetration charge, which was an accurate statement of the law, violated the defendant's due process rights. The charge did not instruct the jury that rape could be committed in a manner different than charged in the indictment. Liger v. State, 318 Ga. App. 373, 734 S.E.2d 80 (2012).

Sufficiency of Evidence

Proof of force.

Victim's testimony that the victim pretended to be asleep because the victim was scared and that when the victim failed to obey the defendant's command to open the victim's legs, the defendant pushed the victim's legs open, was sufficient evidence of force to support the defendant's rape conviction. Wynn v. State, 322 Ga. App. 66, 744 S.E.2d 64 (2013).

Evidence of similar prior offense held admissible.

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the

victim and had not raped her. Bell v. State, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Under the preponderance of the evidence standard, the trial court did not err in finding that there was sufficient evidence that the two prior rapes occurred and were committed by the defendant to authorize their admission at trial because, inter alia, both victims positively identified the defendant as their assailant in photographic lineups. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014).

Evidence of similar offense admissible to show bent of mind.

Trial court was authorized to find that the probative value of the similar transaction evidence outweighed its prejudicial effect as the defendant's prior rapes were relevant and admissible to prove the defendant's bent of mind, course of conduct, and lustful disposition, and to corroborate the current rape victim's testimony of no consent. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014).

Sufficient evidence to authorize conviction.

Evidence was sufficient to authorize the jury to find the defendant guilty of statutory rape beyond a reasonable doubt because the defendant befriended the 12-year-old victim, and on various occasions the defendant engaged in sexual contact with the victim; the defendant fondled the victim's breasts and vaginal area, inserted his finger into her vagina, and inserted his penis into her mouth and vagina. Beaudoin v. State, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Evidence was sufficient to show both force and lack of consent because the victim stated that the defendant refused to stop when the victim told the defendant that the victim did not want to have sex with the defendant; the defendant repeatedly had sexual intercourse with the victim, threatening the victim not to tell anyone. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Defendant's conviction for aggravated assault and rape was affirmed because there was no evidence of tampering or contamination and the trial court properly admitted the evidence from the rape kit and the defendant's DNA matched that of the victim's attacker and the similar transaction evidence that the defendant had committed another rape of an exotic dancer was sufficient to support the conviction. Mickens v. State, 318 Ga. App. 601, 734 S.E.2d 438 (2012).

Ten-year-old victim's testimony that on one occasion the defendant ordered the victim into the defendant's bed where the defendant had vaginal intercourse with the victim was sufficient to support the defendant's rape conviction. The jury could have inferred that the victim did not willingly consent but was intimidated into complying with the defendant's demands out of fear of punishment. Smith v. State, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

Evidence was sufficient to convict the defendant of rape because the victim testified that the defendant forced the victim to have sexual intercourse with the defendant against the victim's will; the victim's testimony, standing alone, was sufficient to sustain the conviction; and testing showed that DNA found on the swabs taken from the victim as part of the sexual assault kit matched the defendant's DNA profile. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014).

Testimony by the defendant's daughter that when the daughter was 12 the defendant put the defendant's penis in the daughter's vagina more times than the daughter could count, the daughter told the defendant "no" but the defendant would not stop, and that the defendant put the defendant's "thingy" in the daughter far enough that it hurt and moved up and down was sufficient to support the defendant's conviction for rape. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Victim's testimony alone sufficient.

In accord with Smith v. State. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Evidence was sufficient to convict the defendant of rape in violation of O.C.G.A. § 16-6-1 because, without anything more, the victim's testimony was enough to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed rape; the victim testified at trial and stated that the defendant entered the victim's bedroom, held down the victim's hands as the victim tried to push the

Sufficiency of Evidence (Cont'd)

defendant away, and had sexual intercourse with the victim as the victim screamed. Roberts v. State, 313 Ga. App. 849, 723 S.E.2d 73 (2012).

Minor victim's testimony that the sexual intercourse hurt and that the victim did not consent and was afraid of the defendant provided the evidence of force necessary to support the defendant's rape convictions. Brown v. State, 319 Ga. App. 680, 738 S.E.2d 132 (2013).

Victim's testimony that the defendant forced the victim, through the defendant's use of a knife, to drive to a remote location and submit to sexual intercourse was sufficient to support the defendant's conviction for rape. Pye v. State, 322 Ga. App. 125, 742 S.E.2d 770 (2013).

Evidence sufficient to support conviction.

Defendant's rape conviction was supported by the investigator's testimony that the victim told the investigator that the defendant inserted the defendant's penis into the victim's vagina. Gordon v. State, 327 Ga. App. 774, 761 S.E.2d 169 (2014).

Evidence overwhelmingly supported the defendant's conviction for forcible rape in violation of O.C.G.A. § 16-6-1(a)(1) because the state introduced the victim's testimony, the testimony of eyewitnesses to the act, the examining physician's testimony, and the photographic evidence. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

State of Georgia presented sufficient evidence of forcible rape when: (1) the minor victim testified that the defendant engaged in intercourse with the victim in various positions, that it hurt, and that the victim did not consent; (2) a sexual assault nurse examiner (SANE) testified as to the victim's disclosure that it stung when the defendant put the defendant's penis in the victim's vagina and that it bled on one occasion; and (3) the SANE testified regarding (and the jury viewed photographic evidence of) a laceration to the victim's posterior fourchette, which the SANE testified was consistent with sexual intercourse as alleged by the victim. Jordan v. State, 317 Ga. App. 160, 730 S.E.2d 723 (2012).

Evidence which included DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

While the victim initially identified someone else as the assailant, evidence that that defendant's DNA matched the seminal fluid found on the victim's clothing, the defendant was seen near the house shortly after the rape, and the defendant's shirt was found in the residence supported the defendant's convictions for rape, child molestation, false imprisonment, and burglary. Couch v. State, 326 Ga. App. 207, 756 S.E.2d 291 (2014).

Evidence sufficient for conviction of attempted rape.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Failure to preserve material from abortion. — When the defendant was

convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, because the preservation of evidence statute applies to physical evidence containing biological material that could identify the perpetrator and is collected at the time of the crime, the statute did not apply to the biological material collected at the victim's abortion more than two months after the crime occurred; and it did not apply to the sample collected from the victim's abortion because the sample was contaminated due to the storage procedure used by the medical clinic, not the state, and there was no usable biological material that would relate to the identity of the perpetrator. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

16-6-2. Sodomy; aggravated sodomy; medical expenses.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Solicitation of sodomy.

Victim's testimony was sufficient to sustain the defendant's conviction for solicitation of sodomy in violation of O.C.G.A. § 16-6-15(a) because the victim testified that the defendant offered to give the victim money for oral sex. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Indictment sufficient.

Defendant was properly convicted of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) because there was no fatal variance between the allegations and the proof at trial; the indictment was sufficient to put the defendant on notice that the defendant could be convicted for an act of oral sodomy involving the victim's mouth and the defendant's sex organ; the allegation that the defendant did perform an immoral and indecent act of sodomy to a child did not necessarily require that the act involve the defendant's mouth and the victim's sexual organ. Weeks v. State, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

Evidence sufficient for child molestation conviction.

Evidence was sufficient to authorize a juvenile's adjudication of delinquency for acts of aggravated sodomy and child molestation beyond a reasonable doubt based on the evidence that showed that the juvenile not only had rubbed the juvenile's penis against the victim's buttocks, but also placed the penis inside the victim's anus and that such contact hurt the victim. In the Interest of M.C., 322 Ga. App. 239, 744 S.E.2d 436 (2013).

Ineffective assistance of counsel not found. — In a 28 U.S.C.S. § 2254 case in which a defendant was challenging conviction under O.C.G.A. § 42-1-12, the determination of the Georgia Court of Appeals that trial counsel's failure to challenge the use of defendant's conviction under an unconstitutional anti-sodomy statute, O.C.G.A. § 16-6-2(a)(1), to convict defendant for failure to register as a sex offender was not ineffective assistance resulted in a decision that was an unreasonable application of federal law. Green v. Georgia, 2013 U.S. Dist. LEXIS 173003 (N.D. Ga. Dec. 9, 2013).

Cited in Muse v. State, 323 Ga. App. 779, 748 S.E.2d 136 (2013); Ashmore v. State, 323 Ga. App. 329, 746 S.E.2d 927 (2013); Nichols v. State, 325 Ga. App. 790, 755 S.E.2d 33 (2014).

Aggravated Sodomy

Prior similar transactions evidence admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a

Aggravated Sodomy (Cont'd)

child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which, was both direct evidence of the victims own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

There was sufficient evidence to support the defendant's conviction for aggravated sodomy because the victim testified that while holding a knife, and after having vaginal intercourse with the victim against her will, the defendant put his penis into her mouth to ejaculate; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone was sufficient to support a finding of guilt beyond a reasonable doubt. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Evidence that the first victim attempted to avoid the abuse by asking to sleep in a different room or trying to sleep on the couch was sufficient to authorize the jury to conclude that the defendant used force when the defendant performed oral sex on the first victim. Conley v. State, 329 Ga. App. 96, 763 S.E.2d 881 (2014).

Evidence that the second victim referred to the defendant as "uncle," the defendant forced the second victim to touch his penis, the defendant removed the victim's underwear before molesting the victim, and the defendant attempted to keep the victim silent was sufficient for the jury to find that the second victim was forced to engage in oral sex. Conley v. State, 329 Ga. App. 96, 763 S.E.2d 881 (2014).

Severance of offenses.

Trial court did not err in denying the defendant's motion to sever the charges of rape, aggravated assault, kidnapping with bodily injury, and aggravated sodomy arising out of three sexual assaults against three different women because the charges against the defendant clearly showed a recurring pattern of conduct suggesting a common scheme or modus operandi as the victims of the three sexual assaults were adult women who did not know the defendant, all three incidents occurred in DeKalb County within 6 months of each other, each victim was taken by vehicle to a secluded location before the victims were raped, all three incidents involved a handgun, and semen matching the defendant's DNA profile was found on each victim. Ray v. State, 329 Ga. App. 5, 763 S.E.2d 361 (2014).

Counsel ineffective for rejecting plea bargain in sodomy case. — In defendant's sodomy case, in which O.C.G.A. § 16-6-2(b)(2) provided for a mandatory sentence of imprisonment for life or a split sentence that was a term of

imprisonment for not less than 25 years, following probation for life, counsel was ineffective in actively lobbying the defendant's client to reject a plea bargain under which the sodomy charge would have been dropped and the defendant would have received a 12-year sentence with credit for time served and the balance on probation. State v. Lexie, 331 Ga. App. 400, 771 S.E.2d 97 (2015).

16-6-3. Statutory rape.

Cross references. — Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

JUDICIAL DECISIONS

Analysis

General Consideration

Denial of first offender status was affirmed. — Defendant's sentence for statutory rape was affirmed because the "any portion thereof" language in O.C.G.A. § 17-10-6.2(c)(1) indicated that the legislature's intent was not to allow the trial court to deviate from the entirety of § 17-10-6.2(b), but rather to grant the trial court discretion to deviate only from the mandatory minimum sentence guidelines. Tew v. State, 320 Ga. App. 127, 739 S.E.2d 423 (2013).

Misdemeanor rape sentence inappropriate. — Since it was undisputed that the victim was 14 years old and was not the defendant's spouse at the time they engaged in sexual intercourse, the trial court was not required to sentence the defendant for misdemeanor statutory rape under O.C.G.A. § 16-6-3(c). Algren v. State, 330 Ga. App. 1, 764 S.E.2d 611 (2014).

Cited in Burke v. State, 316 Ga. App. 386, 729 S.E.2d 531 (2012); Ashmore v. State, 323 Ga. App. 329, 746 S.E.2d 927 (2013).

Evidence

Corroborating evidence.

There was sufficient corroboration of a victim's testimony for a jury to find the defendant guilty beyond a reasonable doubt of statutory rape, O.C.G.A. § 16-6-3(a), because one of the victim's sisters testified about the victim's statements to the sister and about the sister's observation of the victim and the defendant going into a bedroom together during the relevant time period; the victim's great aunt testified that when the victim told the aunt about the sexual abuse, the victim specifically said that the defendant was having sex with the victim. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Evidence was sufficient to find defendant guilty of statutory rape and child molestation under O.C.G.A. §§ 16-6-3(a)

Evidence (Cont'd)

and 16-6-4(a)(1) because the minor victim's testimony was corroborated by the medical evidence, defendant's opportunity to commit the alleged crimes, defendant's statements during a phone call, and defendant's admission to one incident of sexual intercourse. Sanchez v. State, 316 Ga. App. 40, 728 S.E.2d 718 (2012).

Corroborative evidence tending to prove guilt of accused.

Defendant's conviction for statutory rape was affirmed because the victim's prior consistent statements, as recounted by third parties to whom such statements were made, constituted sufficient substantive evidence of corroboration and the cousin and boyfriend provided circumstantial evidence as to defendant's access to and contact with the victim. Brown v. State, 318 Ga. App. 334, 733 S.E.2d 863 (2012).

Corroboration and sufficiency of evidence.

Evidence was sufficient to support defendant's conviction for statutory rape because (1) the underage victim met defendant on the Internet and asked defendant to come to Florida to pick the victim up, which defendant did; (2) defendant and the victim returned to defendant's home in Georgia and engaged in sexual intercourse; (3) the victim got homesick and returned home; (4) the victim again asked defendant to come get the victim, which defendant did; (5) the couple returned to defendant's home in Georgia and again had sexual intercourse; and (6) when the couple got into an argument that escalated into a struggle, the victim called the police, who responded to the call. Baker v. State, 316 Ga. App. 122, 728 S.E.2d 767 (2012).

Victim's testimony that the defendant performed oral sex on the victim when the victim was 13 years old, corroborated by the victim's prior consistent statements to the victim's father and to the responding officers and by the defendant's confession to the officers, was sufficient to support the defendant's conviction for statutory rape. Hill v. State, 331 Ga. App. 280, 769 S.E.2d 179 (2015).

Sufficient evidence.

Evidence was sufficient to convict the defendant of statutory rape because the victim testified that the defendant performed oral sex on the victim once and that they engaged in sexual intercourse twice, and the defendant admitted that the defendant had engaged in sexual intercourse with the victim. Lockhart v. State, 323 Ga. App. 887, 748 S.E.2d 694 (2013).

Merger with Other Offenses

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court's discretion. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Merger properly denied. — Trial court did not err in denying the defendant's request to merge the defendant's convictions for statutory rape and fornication for the purpose of sentencing because the defendant waived the issue of whether the offenses should have been merged when the defendant knowingly and voluntarily pled guilty to each of the crimes. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Jury Issues and Instructions

Erroneous charge.

Defendant's conviction for statutory rape was reversed because the trial court committed plain error by giving an erroneous jury charge, which affected the defendant's substantial right to a charge that provided the jury with the proper guideline for determining the defendant's guilt or innocence, and the court failed to remedy the error. Agan v. State, 319 Ga. App. 560, 737 S.E.2d 347 (2013).

16-6-4. Child molestation; aggravated child molestation.

Cross references. — Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

JUDICIAL DECISIONS

Analysis

General Consideration

Voluntary waiver of right to remain silent. — Defendant's convictions were affirmed because the defendant was aware that the defendant was being questioned with regard to the victim's allegations of molestation; understood that the allegations were serious; was not under the influence of drugs or alcohol; and was advised of the defendant's Miranda rights, waived those rights, and signed a form confirming the waiver. Pendleton v. State, 317 Ga. App. 396, 731 S.E.2d 75 (2012).

Inference of intent.

Defendant's conviction of child molestation was affirmed because the jury was entitled to infer from the direct and circumstantial evidence that the defendant acted with the intent to arouse or satisfy the defendant's own sexual desires. Parrott v. State, 318 Ga. App. 545, 736 S.E.2d 436 (2012).

Indictment sufficient. — Trial court properly denied the defendant's motion for arrest of judgment because the indictment charged attempted aggravated child molestation based on the defendant's act of asking the victim if the victim performed a certain sexual action and referred to the statutory language for attempt and aggravated child abuse as well as specifically alleged that the victim was under the age of sixteen, thus, the indictment sufficiently placed the defendant on notice of the charges. Ashmore v. State, 323 Ga. App. 329, 746 S.E.2d 927 (2013).

Indictment was not flawed for charging several ways of committing the crime. — Child molestation defendant's behavior in the indictments occurred during the time alleged in the indictments, and the evidence, including testimony from the victims, was sufficient to show that the defendant committed child molestation in at least one of the ways alleged in the indictments. Therefore, even though the indictment used the conjunctive rather than the disjunctive form, the indictment was sufficient. Cain v. State, 310 Ga. App. 442, 714 S.E.2d 65 (2011).

Fatal variance in indictment and conviction. — While the victim's testimony that the defendant engaged the victim in sexual activity and inserted the defendant's penis into the victim's anus was sufficient to prove aggravated child molestation, the defendant was entitled to reversal of that conviction because there was a reasonable possibility that the jury convicted the defendant of that crime in a manner not alleged in the indictment. The indictment alleged that the defendant committed the crime by engaging in sodomy, the evidence at trial included both evidence of sodomy and evidence that the victim was physically injured as a result of sexual intercourse with the defendant, which could also support such a conviction, and the jury was not instructed to limit the jury's consideration to the commission of the crime as alleged in the indictment. Smith v. State, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

Indictment sufficient with regard to Internet sting operation allegations. — With regard to an indictment charging the defendant with computer

General Consideration (Cont'd)

pornography, attempted aggravated child molestation, and attempted child molestation arising from an Internet sting operation, the appellate court erred by finding that a second indictment was insufficient to withstand a special demurrer because the indictment identified the victim by the only name which the defendant knew the intended victim by and informed the defendant that the intended victim was not an actual child. State v. Grube, 293 Ga. 257, 744 S.E.2d 1 (2013).

What constitutes an immoral or indecent act. — Any act generally viewed as morally and sexually indelicate, improper, and offensive can constitute child molestation and whether an act is immoral or indecent is a jury question. Thomas v. State, 324 Ga. App. 26, 748 S.E.2d 509 (2013).

Testimony regarding defendant's character trait of moral behavior and trustworthiness. — In a child molestation case, the trial court did not restrict the defendant's character witnesses' ability to testify as to the defendant's character trait of moral behavior and trustworthiness with children as three witnesses testified as to that character trait and any additional testimony regarding the defendant's morality and trustworthiness with children would have been cumulative. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Additional allegation admissible despite late disclosure. — In a child molestation case, because the state immediately notified defense counsel approximately five days before trial of the additional allegation that the defendant had the victim, the defendant's daughter, perform oral sex on the defendant, and defense counsel had an opportunity to investigate the issue and/or request a continuance prior to trial, the defendant's challenge to the admissibility of the additional allegation based on the untimeliness of the state's disclosure lacked merit. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Venue.

Trial court did not err in denying the defendant's motion for directed verdict because the testimony, taken as a whole, was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the child molestation was committed in Fayette County; during trial and the victim's forensic interview, the victim described that the molestation incident occurred during a visit to the victim's aunt's residence, which was located in Fayette County, Georgia, and two detectives testified that the referenced visit and molestation incident took place at a residence in Fayette County. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Venue issue meant evidence insufficient for conviction. — Evidence was insufficient as to count four of the Coweta County indictment alleging child molestation because the victim of that offense testified without equivocation that the incident occurred in Carroll County; and the defendant waived venue only as to the crimes indicted in Carroll County, not the Coweta County offenses. Cavender v. State, 329 Ga. App. 845, 766 S.E.2d 196 (2014).

Defense counsel not ineffective.

Any attempt by trial counsel to file a demurrer to the count of an indictment charging the defendant with child molestation, O.C.G.A. § 16-6-4(a)(1), would have been futile because nothing in the child molestation statute specifically prohibited the state from prosecuting the defendant on the ground that the defendant engaged in sexual intercourse with the victim; while sexual intercourse is not an element of child molestation, an adult's act of sexual intercourse with a child falls within the parameters of the child molestation statute. Burke v. State, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

As to the defendant's convictions for child molestation, sexual battery, and enticing a child for indecent purposes, the defendant failed to establish that trial counsel's performance prejudiced the defense for failing to investigate the victim receiving prior parental discipline as trial counsel got the victim to admit to being afraid of getting into trouble for coming home late on the night of the incident. Carstaffin v. State, 323 Ga. App. 354, 743 S.E.2d 605 (2013).

Double Jeopardy did not bar retrial. — Double Jeopardy Clause, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not bar retrial of a defendant as the evidence supported the defendant's conviction under O.C.G.A. § 16-6-4(a) when: (1) the victim told the victim's sister that the defendant had gotten on top of the victim; (2) the sister told the mother, and the victim laid on the bed and moved up and down to show the mother what the defendant did to the victim; (3) the mother told an acquaintance, who reported the incident to an officer; (4) the officer reported the incident to the officer's supervisor, and also spoke with the mother; and (5) the victim told the forensic investigator that the defendant took his clothes off, got on top of the victim as the victim was fully clothed, moved his body up and down, and rubbed his penis against the victim's buttocks. Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536 (2012).

Severance of offenses.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses involving two child molestation victims because although the charged offenses involved different victims and occurred on different dates, the actions showed the defendant's common motive, lustful disposition, and bent of mind to satisfy the defendant's sexual desires; the defendant gained access to the second victim through a familial relationship with the first victim, and the molestation of the first victim came to light during the investigation of the molestation of the second victim. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. Heck v. State, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Ex post facto violation in sentencing. — Trial court erred in imposing life sentences as to two counts of aggravated sexual molestation because those sentences were ex post facto in application; the defendant was sentenced under a later version of the statute, O.C.G.A. § 16-6-4(d)(1), than the one in effect when the crimes were committed. Ewell v. State, 318 Ga. App. 812, 734 S.E.2d 792 (2012).

Sufficiency of the evidence. — Evidence was sufficient to find defendant guilty of statutory rape and child molestation under O.C.G.A. §§ 16-6-3(a) and 16-6-4(a)(1) because the minor victim's testimony was corroborated by the medical evidence, defendant's opportunity to commit the alleged crimes, defendant's statements during a phone call, and defendant's admission to one incident of sexual intercourse. Sanchez v. State, 316 Ga. App. 40, 728 S.E.2d 718 (2012).

Defendant's claim that the state failed to prove the offense because the victim was asleep during the entire incident lacked merit, because the child's actual sight of the sexual organs was not required for a child molestation conviction. Clemens v. State, 318 Ga. App. 16, 733 S.E.2d 67 (2012).

Cited in Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011); Bolton v. State, 310 Ga. App. 801, 714 S.E.2d 377 (2011); Kaylor v. State, 312 Ga. App. 633, 719 S.E.2d 530 (2011); Brown v. Parody, 294 Ga. 240, 751 S.E.2d 793 (2013); Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

Application

Sentence did not constitute cruel and unusual punishment.

Trial counsel was not ineffective in failing to object to the life sentence for aggravated child molestation as the defendant's sentence did not raise a threshold inference of gross disproportionality because the evidence established that the defendant, while engaged in sexual intercourse with a girlfriend, summoned the 14-year-old victim, who was working alongside other young women as a prostitute on the defendant's behalf, to the defendant's room and placed the defendant's sexual organ in the victim's mouth while the defendant's testicles were placed in the girlfriend's mouth. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015).

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Victim's testimony alone is sufficient to sustain conviction under O.C.G.A. § 16-6-4.

Victim's testimony that when she was 14 years old, the defendant, her step-father, entered her bedroom, laid on top of her, rubbed her breasts, and kissed her on the mouth, neck, and breasts was sufficient to support a jury verdict that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Evidence from a child molestation victim was sufficient to convict a defendant of five counts of child molestation in violation of O.C.G.A. § 16-6-4. The trial court properly admitted evidence that the defendant had asked the victim's sister to sleep with the defendant on a couch, and properly denied evidence that the victim had made an accusation of sexual misconduct against the victim's grandfather. Mauldin v. State, 313 Ga. App. 228, 721 S.E.2d 182 (2011).

Defendant's challenge to the sufficiency of the evidence, based solely on the argument that the victim's testimony was unbelievable, failed because the victim's testimony alone was sufficient to establish the elements of child molestation. Medrano v. State, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

There was sufficient evidence to support defendant's convictions for child molestation and enticing a child for indecent purposes based on the testimony of the victim, who stated that when she was 10-years-old, she encountered defendant, who grabbed her arms, forcefully moved her from the stairwell into an empty apartment, and forced her to have vaginal intercourse with him. Rollins v. State, 318 Ga. App. 311, 733 S.E.2d 841 (2012).

There was sufficient evidence to support the defendant's conviction for child molestation, aggravated child molestation, and first degree cruelty to children with regard to the defendant's girlfriend's niece based on the testimony of the victim and similar transaction evidence involving the defendant's older daughter. Royal v. State, 319 Ga. App. 466, 735 S.E.2d 793 (2012).

Victims' testimony that the defendant pulled down the victim's pants, reached into the victim's underwear, fondled the victim's genitals, and touched them with the defendant's penis was sufficient to support the defendant's convictions for sexual battery and child molestation. Reid v. State, 319 Ga. App. 782, 738 S.E.2d 624 (2013).

Denial of the defendant's motion for a directed verdict of acquittal was not erroneous because the victim's testimony was sufficient to permit the jury to infer that the defendant acted with the intent to arouse or satisfy the defendant's sexual desires, including that, in several incidents the defendant would come into the victim's bedroom at night and ask the victim if the victim wanted to sleep with the defendant. Defendant would then molest the victim by reaching underneath the victim's clothes, fondling the victim's breasts and vagina, nibbling on the victim's earlobes, and kissing the victim's breasts. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

Victims' testimony, which was consistent with their outcry statements and forensic interviews, was sufficient to support the defendant's convictions for child molestation. The jury could have inferred that when the defendant showered nude with one of the victims and forced the other to watch pornography the defendant did so for purposes of sexual arousal or satisfaction. Brown v. State, 324 Ga. App. 718, 751 S.E.2d 517 (2013).

Testimony of the first victim that the defendant touched the victim's body from the victim's breasts to vagina with the defendant's mouth, penis, and hands and, also, with a vibrator, and made the victim place the victim's mouth on the defendant's penis was sufficient to support the defendant's convictions for child molestation. Wofford v. State, 329 Ga. App. 195, 764 S.E.2d 437 (2014).

Testimony of the second victim that the defendant licked the victim's vagina, rubbed the defendant's penis against the victim, masturbated in front of the victim, and put the victim's hands on the defendant's penis was sufficient to support the defendant's conviction for child molestation. Wofford v. State, 329 Ga. App. 195, 764 S.E.2d 437 (2014).

Victim's testimony that the victim had oral sex with the defendant when the victim was 13 years old, standing alone, was sufficient to support the defendant's conviction for aggravated child molestation. Hill v. State, 331 Ga. App. 280, 769 S.E.2d 179 (2015).

Recanting of child victim's testimony.

Evidence was sufficient to sustain the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because although the victim recanted prior statements concerning the defendant's acts of sodomy, the recantation did not preclude a conviction since the victim's prior inconsistent statements concerning the defendant's acts of sodomy were allowed to serve as substantive evidence of the defendant's guilt. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Attempted child molestation.

Conviction of attempted child molestation is authorized when the evidence shows that the defendant communicated with an adult whom the defendant believed to be a child under sixteen years of age and took substantial steps to meet with that person to engage in sexual activity that would constitute child molestation. Lopez v. State, 326 Ga. App. 770, 757 S.E.2d 436 (2014).

Admissibility of evidence of similar or connected offenses against children.

During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward molesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. Jackson v. State, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Testimony of a defendant's adult stepdaughter regarding the defendant's molestation of her when she was a child was admissible as a similar transaction in the defendant's trial for molestation of his two granddaughters because both the present case and the similar transaction involved defendant molesting underage family members who were in his home. Downer v. State, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Because the defendant's prior convictions under O.C.G.A. § 16-12-100.2(d)(1) and (e)(1) and the defendant's indictment for aggravated sexual battery, aggravated child molestation, and child molestation alleged crimes that were sexual in nature with minors and involved a lustful disposition, the independent offenses were admissible under Ga. Unif. Super. Ct. R. 31.3(B). Butler v. State, 311 Ga. App. 873, 717 S.E.2d 649 (2011).

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's

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attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence of similar or connected sexual offenses against adults.

Trial court did not abuse the court's discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Evidence of victim's age sufficient.

Trial court did not err by denying defendant's special demurrer to two counts of incest with regard to defendant's younger daughter based on the daughter not being under the age of 16 because defendant failed to present any evidence of the daughter's birthdate. Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

No *Crawford* violation.

Trial court properly denied defendant's motion for a new trial and upheld his conviction for child molestation because even if the trial court erred by admitting the child victim's recorded interview and her statements to the police investigator, the forensic interviewer, her mother, and a relative, any such error was harmless beyond a reasonable doubt because the evidence against defendant was so overwhelming and cumulative in the nature of the testimony of the emergency room physician, defendant's written statement and recorded confession, and his admissions to others; plus, the child victim's recantations were also admitted into evidence. Welch v. State, 318 Ga. App. 202, 733 S.E.2d 482 (2012).

Spouse guilty of aiding and abetting in child molestation. — Evidence was sufficient to support defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when defendant's spouse brought the victim back to their home, the spouse left the victim with defendant who admitted to giving the victim thong panties; (2) defendant gave the victim alcohol, and gave the victim pornographic materials to read before defendant's spouse came home; and (3) defendant was close by on the couch when defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. Dockery v. State, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Evidence was sufficient for the jury to find a defendant guilty of child molestation, etc.

Testimony of one of the defendant's granddaughters to the effect that the defendant touched her genital area with his hand and pulled her hand to touch his penis and the other victim's testimony that the defendant touched her genital area was sufficient to support the verdict of guilty on three child molestation charges in violation of O.C.G.A. § 16-6-4(a). Downer v. State, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Evidence was sufficient to authorize the

finder of fact to find that the defendant acted with the intent to arouse or satisfy the defendant's own or the victim's sexual desires because the defendant touched the victim inappropriately; the testimony of the victim was corroborated by the victim's young cousins, who witnessed the incident, and the victim gave consistent accounts of the incident to police officers, the forensic interviewer, and the victim's aunt's boyfriend. Reyes-Vera v. State, 313 Ga. App. 467, 722 S.E.2d 95 (2011).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Defendant's conviction for child molestation in violation of O.C.G.A. § 16-6-4(a)(1) could be supported by evidence that the defendant removed the victim's underwear or that the defendant exposed his penis because, in either event, the evidence was sufficient to sustain his conviction. Lipscomb v. State, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Defendant's challenge to the sufficiency of the evidence to support the defendant's aggravated child molestation conviction failed because the victim's testimony, standing alone, was sufficient to support the verdict, and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820). Anderson v. State, 315 Ga. App. 679, 727 S.E.2d 504 (2012).

Evidence was sufficient to support the defendant's conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), because the minor victim testified that the defendant performed oral sex on the victim and made the victim perform oral sex upon the defendant, which was corroborated by the testimony of a sexual assault nurse examiner that the victim disclosed that the defendant put the defendant's penis in the victim's mouth and that the victim described the look and taste of semen. Jordan v. State, 317 Ga. App. 160, 730 S.E.2d 723 (2012).

When the victim described the defendant's abuse to the jury and in a recorded forensic interview that was played for the jury, and the victim included details that the forensic interviewer found inconsistent with someone who had been coached, the victim's testimony and the forensic interview supported the defendant's convictions for aggravated child molestation, child molestation, and first degree cruelty to children. Worley v. State, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

Physical evidence of the trauma to at least one victim, together with the consistency of the victims' statements to the outcry witnesses, law enforcement, and the forensic interviewer, the similar transaction testimony, and the evidence showing opportunity, sufficed to establish each element of the charges of aggravated sexual battery and child molestation. Tudor v. State, 320 Ga. App. 487, 740 S.E.2d 231 (2013).

Sufficient evidence supported the defendant's conviction for child molestation based on the testimony of the 19-year-old victim, defendant's daughter, that the defendant entered the victim's bedroom and touched the victim's vagina as well as evidence that the defendant committed similar acts upon two stepdaughters. Riddick v. State, 320 Ga. App. 500, 740 S.E.2d 244 (2013).

Evidence that the victim told the victim's older brother and a forensic interviewer that the defendant made the victim massage the defendant's penis to the point of ejaculation was sufficient to support the defendant's conviction for child molestation. Maurer v. State, 320 Ga. App. 585, 740 S.E.2d 318 (2013).

Evidence, which included a picture the victim drew showing the victim's markings on the victim's buttocks along with the victim's written words "no, no, no" and

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a physical examination that revealed healed scars on the victim's anus, which the examining expert opined was consistent with penetration by a penis, supported the defendant's convictions for aggravated child molestation and child molestation under O.C.G.A. § 16-6-4(a)(1) and (c). Carter v. State, 321 Ga. App. 877, 743 S.E.2d 538 (2013).

Evidence was sufficient to authorize a juvenile's adjudication of delinquency for acts of aggravated sodomy and child molestation beyond a reasonable doubt based on the evidence that showed that the juvenile not only had rubbed the juvenile's penis against the victim's buttocks, but also placed the penis inside the victim's anus and that such contact hurt the victim. In the Interest of M.C., 322 Ga. App. 239, 744 S.E.2d 436 (2013).

While the victim initially identified someone else as the assailant, evidence that that defendant's DNA matched the seminal fluid found on the victim's clothing, the defendant was seen near the house shortly after the rape, and the defendant's shirt was found in the residence supported the defendant's convictions for rape, child molestation, false imprisonment, and burglary. Couch v. State, 326 Ga. App. 207, 756 S.E.2d 291 (2014).

Victim's testimony that the defendant told the victim to remove the victim's underwear and then placed the defendant's private in the victim's butt, testimony from the defendant's friend that the defendant admitted masturbating behind the victim's naked body, and the fact that fluid and sperm matching the defendant's DNA were found on the victim's bedsheet supported a conviction for child molestation. O'Rourke v. State, 327 Ga. App. 628, 760 S.E.2d 636 (2014).

Evidence that the victim was under the age of 16, that the defendant had expressed a sexual interest in her, and that the defendant asked the victim about her sexual arousal and put his hand down her pants, touching her vagina, was sufficient to authorize the jury to find the defendant guilty of child molestation. Watson v. State, 329 Ga. App. 334, 765 S.E.2d 24 (2014).

Victim's testimony that the defendant asked the victim to undress in front of the defendant more times than the victim could count and that the defendant touched, kissed, and licked the victim's breasts was sufficient to support the defendant's conviction for child molestation. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Evidence of defendant's sexual arousal.

Child victim's testimony that the defendant, her grandfather, asked her if she had pubic hair and tried to touch her vaginal area, asked her if she would like to touch his penis and exposed it to her, and attempted to kiss her on the lips, supported his convictions for child molestation and enticing a child for indecent purposes under O.C.G.A. §§ 16-6-4 and 16-6-5. Craft v. State, 324 Ga. App. 7, 749 S.E.2d 16 (2013).

Evidence of child molestation.

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012).

Evidence part of res gestae.

In a child molestation case, because the victim, the defendant's daughter, testified that the defendant had the victim perform oral sex on the defendant during the incident when the defendant exposed the defendant's sexual organ to the victim, the evidence of the oral sex was admissible as part of the res gestae of the crime for which the defendant was charged, despite the fact that the defendant was not charged with the additional crime in the indictment. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Exposure to child constitutes child molestation.

Jury could determine that the defen-

dant's genitalia was exposed to the victim, which was sufficient evidence of child molestation, because the victim described the defendant's penis in the forensic interview. Lipscomb v. State, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Kisses constituted an immoral or indecent act. — Sufficient evidence supported the defendant's conviction for child molestation based on the victim's testimony and the defendant's admission that the defendant kissed the victim several times because the jury was authorized to conclude that the kisses constituted an immoral or indecent act under O.C.G.A. § 16-6-4(a)(1). Thomas v. State, 324 Ga. App. 26, 748 S.E.2d 509 (2013).

Underwear on backwards as evidence of molestation. — Jury could infer that the victim's underwear had been removed by the defendant and hurriedly replaced, which was sufficient evidence of child molestation, because the victim's parents testified that before the parents left to run a quick errand, the victim's underwear was on properly, but it was on improperly when the parents returned; in a forensic interview, the victim explained to the interviewer that the defendant removed the victim's underwear and then replaced the underwear. Lipscomb v. State, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence was sufficient to enable a jury to find that the defendant acted with the intent to arouse or satisfy the defendant's own or the victim's sexual desires and that the defendant was guilty beyond a reasonable doubt of child molestation because there was significant inferential evidence of the defendant's intent to arouse the defendant's sexual desires or the sexual desires of the victim. Burke v. State, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Evidence was sufficient to support the defendant's two convictions for child molestation because the victim's testimony alone could suffice to establish the elements of child molestation; and the victim testified that on one occasion the defendant started rubbing the victim's stomach, and then the defendant moved the defen-

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dant's hand down and touched the victim's pubic hair, and that on two other occasions the defendant had touched the victim's breasts, once while hugging the victim while alone in the defendant's bedroom, and once while the defendant was applying suntan lotion to the victim's body. Pratt v. State, 323 Ga. App. 890, 748 S.E.2d 692 (2013).

Evidence was sufficient to convict the defendant of child molestation because the victim testified that the defendant rubbed the defendant's privates against the victim's exposed sexual organ, and the victim's testimony alone could suffice to establish the elements of child molestation. Lockhart v. State, 323 Ga. App. 887, 748 S.E.2d 694 (2013).

Convictions for child molestation and aggravated child molestation were supported by sufficient evidence as the jury was entitled to rely on the victim's prior inconsistent statements and the nurse's observations from the physical examination, to disbelieve the victim's recantation on the stand and the testimony of the victim's mother and sisters, and find that the defendant had sexually abused the victim. Galvan v. State, 330 Ga. App. 589, 768 S.E.2d 773 (2015).

Evidence was sufficient to support the defendant's conviction for aggravated child molestation as the victim was physically injured by the molestation because a full-term pregnancy involved at least some impairment of the victim's physical condition; and there was evidence that the victim experienced pain during the two-day labor and delivery process. Kendrick v. State, 331 Ga. App. 682, 769 S.E.2d 621 (2015).

Evidence sufficient to sustain conviction.

Evidence relating to counts five through seven of the Coweta County indictment was sufficient to convict the defendant of child molestation because the indictment alleged that the defendant molested the victim of that offense by lifting the bedcovers to stare at the victim's buttocks while the victim was sleeping, by lying down between that victim and a friend as they slept, and lifting the bedcovers off that victim's buttocks on a different occasion while the victim slept on a couch at the victim's grandmother's house; when the victim asked the defendant what the defendant was doing, the defendant left the room; and the defendant committed similar acts against other sleeping girls. Cavender v. State, 329 Ga. App. 845, 766 S.E.2d 196 (2014).

Evidence was sufficient to convict the defendant of two counts of child molestation in Carroll County because the victim of that offense testified that the defendant placed a hand on the victim's buttocks while the victim was sleeping and, on another occasion, lifted the covers near the victim's buttocks and stared at the victim; the defendant committed similar acts against other sleeping girls; and a jury could find that the defendant engaged in immoral or indecent acts against that victim with the intent to arouse or satisfy the defendant's sexual desires. Cavender v. State, 329 Ga. App. 845, 766 S.E.2d 196 (2014).

Evidence insufficient for conviction. — Evidence was insufficient to sustain all four of the defendant's convictions for aggravated child molestation, because a jury reasonably could have inferred that the "bad things" the victim testified the defendant did two or three times a month during the time the victims lived in Oconee County involved defendant's routine and, therefore, defendant performing oral sex on the victim. Bibb v. State, 315 Ga. App. 49, 726 S.E.2d 534 (2012).

No fatal variance.

Defendant was properly convicted of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) because there was no fatal variance between the allegations and the proof at trial; the indictment was sufficient to put the defendant on notice that the defendant could be convicted for an act of oral sodomy involving the victim's mouth and the defendant's sex organ; the allegation that the defendant did perform an immoral and indecent act of sodomy to a child did not necessarily require that the act involve the defendant's mouth and the victim's sexual organ. Weeks v. State, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

Claim that there was a fatal variance

between the aggravated child molestation allegations in the indictment and the evidence presented at trial lacked merit because the indictment sufficiently apprised the defendant of the charges, did not mislead the defendant as to the criminal action with which the defendant was charged, and the victim's reference to the victim's "lower private area" was sufficient to allow the jury to infer that the victim was referring to the victim's vagina, the body part which the indictment alleged that the defendant touched. Hernandez v. State, 319 Ga. App. 876, 738 S.E.2d 701 (2013).

There was no variance between the state's proof and the act alleged in the indictment despite the fact that the victim testified that the defendant touched her breasts and thighs while the indictment alleged that the defendant placed his hand on the victim's "female sex organ," as the victim also testified the defendant cleaned her vaginal area with a towel and a forensic interviewer testified that the victim's initial allegation was that the defendant touched her vaginal area. Stephens v. State, 323 Ga. App. 699, 747 S.E.2d 711 (2013).

Testimony from the victim's mother that the defendant hurriedly put the defendant's genitals back in the defendant's pants after the mother flung the door open to the victim's room and that the vaginal area of the victim's underwear was indented as if someone had touched it, and the victim's testimony that the defendant touched the victim's "tootie," the victim's word for vagina, supported the defendant's convictions for child molestation and aggravated child molestation. Sowell v. State, 327 Ga. App. 532, 759 S.E.2d 602 (2014).

Failure to preserve abortion material. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, because the preservation of evidence statute applies to physical evidence containing biological material that could identify the perpetrator and is collected at the time of the crime, the statute did not apply to the biological material collected at the victim's abortion more than two months after the crime occurred; and the statute did not apply to the sample collected from the victim's abortion because the sample was contaminated due to the storage procedure used by the medical clinic, not the state, and there was no usable biological material that would relate to the identity of the perpetrator. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

Abandonment defense disproved. — With regard to the defendant's convictions for attempted child molestation, the state sufficiently defeated the defendant's defense of abandonment because while the defendant did leave the motel parking lot, it was not until the defendant viewed the task force agents wearing identifying t-shirts, communications through open car windows about defendant's identification were already had, and the defendant left at a high rate of speed in an attempt to flee. Muse v. State, 323 Ga. App. 779, 748 S.E.2d 136 (2013).

Directed verdict of acquittal unwarranted, etc.

When the defendant was charged with using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant stated the defendant wanted "a lot of oral," after the defendant learned that the person was 14 years old; (2) the defendant discussed with the person how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant's actual age; (3) the defendant left the defendant's home of Tennes-

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see to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant's statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any "accidents" in the event the defendant was able to have sex with the person. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Defense counsel not ineffective in child molestation case.

When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, trial counsel was not ineffective in failing to investigate alternate sources of the victim's pregnancy and injuries because trial counsel testified that identifying an alternate sexual partner might have conflicted with the Rape Shield Statute; any sexual contact after the crime would not have been relevant to the victim's injuries and would have been highly prejudicial; and, in light of the victim's testimony, the victim's immediate outcry, and the evidence of male DNA found inside the victim and the victim's vaginal injury, it was not reasonably likely that the result of the trial would have been different. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

First offender consideration not appropriate. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. Harris v. State, 325 Ga. App. 568, 754 S.E.2d 148 (2014).

Life sentences authorized. — Life sentences imposed for aggravated child molestation were authorized by O.C.G.A. § 16-6-4, as the acts alleged occurred after the amendment authorizing life sentences. Cody v. State, 324 Ga. App. 815, 752 S.E.2d 36 (2013).

Admission of challenged evidence deemed harmless error.

Court of appeals properly held that children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the court did not err in declining to extend the holding of Woodard v. State, 269 Ga. 317 (1998), which was overruled as to the defendant's case; there is nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012) (O.C.G.A. § 24-8-820 eliminated the portion of the 1995 amendment to former § 24-3-16 which was held unconstitutional in Woodard v. State).

Indictment contained inadequate information as to alleged victim. — Trial court did not err in granting the defendant's special demurrer and dismissing the indictment charging the defendant with attempted child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4, attempted aggravated child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4(c), and computer pornography, O.C.G.A. § 16-12-100.2(d) because the indictment contained inadequate information as to the alleged victim; attempted child molestation, attempted aggravated child molestation, and computer pornography are crimes against a particular person and require the victim to be identified in the indictment, even where the victim was a police officer using a pseudonym. State v. Grube, 315 Ga. App. 885, 729 S.E.2d 42 (2012).

Evidence that the defendant traveled from Tennessee to an arranged location in Georgia to have sexual intercourse with a person the defendant thought to be a 14-year-old girl, a substantial step toward committing the offense of criminal attempt to commit child molestation, was sufficient to support the defendant's conviction for attempt to commit child molestation. The fact that the girl did not actually exist and thus, the defendant was never in the child's presence did not preclude the defendant's conviction. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

Expert Testimony

Expert testimony regarding child sexual abuse accommodation syndrome, etc.

With regard to the defendant's conviction for child molestation and aggravated sexual battery, the trial court did not err by denying the motion for mistrial or motion for new trial based on the testimony of a forensic interviewer following the child victim's outcry in court about testifying because the forensic interviewer provided only general testimony concerning child abuse accommodation syndrome and the behaviors abused children often exhibit as a result of having been abused and did not testify that in the interviewer's opinion the victim had been abused or that the victim's inability to take the stand to testify against the defendant was a result of having been abused by the defendant. Canty v. State, 318 Ga. App. 13, 733 S.E.2d 64 (2012).

Merging With Other Offenses

Charge of two crimes for same described act.

Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments including the date, the victim, and the description of the defendant's conduct constituting the offense were identical. The charges should have merged for sentencing. Hudson v. State, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Child molestation and aggravated sexual battery.

Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. Gaston v. State, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Child molestation and enticing child for indecent purposes.

Trial court did not err in failing to merge the defendant's convictions for criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes because to convict the defendant of criminal attempt to commit child molestation, the state had to prove that the defendant took a substantial step towards doing an immoral or indecent act to or with someone believed to be under the age of 16, and for purposes of convicting the defendant of criminal attempt to entice a child for indecent purposes, the state was not required to prove that the defendant was acting with an intent or desire to satisfy sexual desires. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Since the defendant encouraged the victim to sneak out of the house and then picked up the victim, drove the victim to a secluded destination, and proceeded to touch the victim in a sexual manner, the evidence showed that the charged offense of enticing a child and child molestation did not merge as a matter of fact, because the defendant completed the enticement before committing the acts of child molestation. Lengsfeld v. State, 324 Ga. App. 775, 751 S.E.2d 566 (2013).

Child molestation and computer child exploitation did not merge. — Because the offenses of criminal attempt to commit child molestation and computer child exploitation each required proof of a fact the other did not, the trial court did not err in sentencing the defendant on both convictions. Brown v. State, 321 Ga. App. 798, 743 S.E.2d 474 (2013).

Lesser offense of cruelty to children, etc.

Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was

Merging With Other Offenses (Cont'd)

caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). Chandler v. State, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Jury Issues and Instructions

Charge to jury.

Defendant was entitled to a new trial because there was a reasonable possibility that the jury convicted the defendant of child molestation, O.C.G.A. § 16-6-4(a), in a manner not charged in the indictment since the trial court did not give a limiting instruction to ensure that the jury would find the defendant guilty in the specific manner charged in the indictment or instruct the jury not to consider child molestation as having occurred in another manner; when the jury expressed the jury's confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit the jury's consideration to determining whether the defendant was guilty of committing child molestation in the specific manner alleged in the indictment only. Smith v. State, 310 Ga. App. 418, 714 S.E.2d 51 (2011), cert. denied, 2012 Ga. LEXIS 249 (Ga. 2012).

Counsel failing to insist complete diary be submitted to jury. — In a child molestation case, trial counsel was not ineffective in failing to insist that the victim's entire diary go out with the jury because the evidence of the feelings of the victim, the defendant's daughter, toward the victim's parents showed that the victim had animosity toward the mother, rather than the defendant; and the diary entries which referenced the allegations that the defendant had fathered a child out of wedlock and failed to satisfy the financial obligations regarding the defendant's children would likely have undermined the defendant's good character defense. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Instruction on lesser included offenses.

Defendant was not entitled to a jury instruction on the lesser included offense of sodomy because there was no evidence to warrant such a charge given the defendant's theory of the case, that defendant, who admittedly spent time alone with the victims, had not touched any of the victims, and the state's evidence that the defendant sodomized the victims with the intent to gratify the defendant's own sexual desires. Ewell v. State, 318 Ga. App. 812, 734 S.E.2d 792 (2012).

Trial counsel was not ineffective in failing to request an instruction on the lesser-included offense of child molestation to the charged offense of aggravated child molestation because there was no evidence that anything other than aggravated child molestation occurred; and because the defense that the victim was lying about the defendant to avoid punishment for running away from home amounted to an all or nothing defense. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015).

Videotape of interview between child victim and investigating officer.

There was no plain error in the trial court's charge to the jury because the trial court gave an appropriate limiting instruction prior to the admission of the similar transaction evidence and because the purposes cited in the trial court's final charge were permissible and relevant to the state's case. Griffin v. State, 327 Ga. App. 751, 761 S.E.2d 146 (2014).

Jury charge upheld.

Because the elements of child molestation were properly limited to those charged in the indictment, the trial court committed no error in the court's charge to the jury on the definition of child molestation. Weeks v. State, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

16-6-5. Enticing a child for indecent purposes.

JUDICIAL DECISIONS

Relationship to other law — In that defendant's prior conviction under O.C.G.A. § 16-6-5 was founded upon defendant's discussions of illicit sexual acts with a minor, such actions necessarily related to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" under 18 U.S.C. § 2252A(b)(1) for purposes of sentence enhancement. United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012).

Sufficiency of indictment.

Defendant failed to show that trial counsel's performance was deficient for not filing a demurrer to the count of the indictment charging the defendant with enticing a child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) because the indictment alleged that the defendant enticed the victim to a place and penetrated the victim's vagina with the defendant's penis. Burke v. State, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Indictment and verdict against the defendant were not contrary to law because there was no actual victim and the victim described in the complaint, a fourteen-year-old female named "Sara," was a fiction created by law enforcement agents, and because O.C.G.A. § 16-12-100.2(d) expressly provides that the sole fact that an undercover operative or law enforcement officer was involved in the detection and investigation under § 16-12-100.2 shall not constitute a defense. Lopez v. State, 326 Ga. App. 770, 757 S.E.2d 436 (2014).

Evidence of similar prior incident admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Child molestation and enticing child for indecent purposes as included offenses.

Trial court did not err in failing to merge the defendant's convictions for criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes because to convict the defendant of criminal attempt to commit child molestation, the state had to prove that the defendant took a substantial step towards doing an immoral or indecent act to or with someone believed to be under the age of 16, and for purposes of convicting the defendant of criminal attempt to entice a child for indecent purposes, the state was not required to prove that the defendant was acting with an intent or desire to satisfy sexual desires. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Child molestation and enticing child for indecent purposes did not merge. — Since the defendant encouraged the victim to sneak out of the house and then picked up the victim, drove the victim to a secluded destination, and proceeded to touch the victim in a sexual manner, the evidence showed that the charged offense of enticing a child and child molestation did not merge as a matter of fact, because the defendant completed the enticement before committing the acts of child molestation. Lengsfeld v. State, 324 Ga. App. 775, 751 S.E.2d 566 (2013).

Attempt to entice child for immoral purposes.

Sufficient evidence supported the defendant's conviction for criminal attempt to entice a child for indecent purposes based on the evidence that the defendant

thought the intended victim was a 15-year-old girl with whom the defendant continued to contact, engaged in sexually explicit conversations, and arranged to meet for a sexual encounter, and although the defendant introduced some evidence in the form of an e-mail to support the claim that the defendant believed the defendant was dealing with an adult, that evidence was not conclusive and it was for the jury to determine the defendant's truthfulness. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Spouse guilty of aiding and abetting in enticing a child for indecent purposes. — Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when the defendant's spouse brought the victim back to their home, the spouse left the victim with the defendant who admitted to giving the victim thong panties; (2) the defendant gave the victim alcohol, and gave the victim pornographic materials to read before the defendant's spouse came home; and (3) the defendant was close by on the couch when the defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. Dockery v. State, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Teacher guilty of enticing student for indecent purposes. — Defendant's conviction for enticing a child for indecent purposes was supported by evidence that the defendant took the victim, a 15-year-old student of the defendant's, in a taxi, a train, and a bus to an inn, the defendant provided the victim with alcohol and marijuana, and the defendant performed oral sex on the victim and raped the victim after the victim was too intoxicated to resist. Clark v. State, 323 Ga. App. 706, 747 S.E.2d 705 (2013).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Using an online chat service, a defendant befriended a White County sheriff's investigator whom the defendant believed to be a 14-year-old girl who said she was a virgin. The defendant asked her if she wanted to have sex, described the sex acts the defendant would perform, and masturbated for her over the defendant's webcam, which also showed the defendant's face. After she agreed to meet with the defendant, the defendant then drove to her county and was apprehended near the meeting site with condoms. This evidence was sufficient to convict. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

State presented sufficient evidence to sustain the defendant's conviction for enticing a child for indecent purposes by unlawfully enticing the victim into a bedroom for the purpose of committing child molestation as a transcript of the victim's interview showed that the defendant had a computer in the defendant's bedroom that sat next to the bed, and when the victim was in another part of the house, the defendant would call the victim into the bedroom and show the victim different porno sites, pictures of naked men, and naked women. Whorton v. State, 318 Ga. App. 885, 735 S.E.2d 7 (2012).

There was sufficient evidence to support defendant's convictions for child molestation and enticing a child for indecent purposes based on the testimony of the victim, who stated that when she was 10-years-old, she encountered defendant, who grabbed her arms, forcefully moved her from the stairwell into an empty apartment, and forced her to have vaginal intercourse with him. Rollins v. State, 318 Ga. App. 311, 733 S.E.2d 841 (2012).

Evidence was sufficient to support the defendant's conviction for enticing a child for indecent purposes under O.C.G.A. § 16-6-5 since the trial testimony and all reasonable inferences drawn from the testimony were sufficient to support a finding that the defendant enticed the victim to the defendant's residence for purposes of child molestation by giving the victim money. Moore v. State, 319 Ga. App. 696, 738 S.E.2d 140 (2013).

Slight movement of the child from the living room sofa to the kitchen table was sufficient asportation to support a conviction for enticing a child for indecent purposes. Tudor v. State, 320 Ga. App. 487, 740 S.E.2d 231 (2013).

Child victim's testimony that defendant, her grandfather, asked her if she had pubic hair and tried to touch her vaginal area, asked her if she would like to touch his penis and exposed it to her, and attempted to kiss her on the lips, supported his convictions for child molestation and enticing a child for indecent purposes under O.C.G.A. §§ 16-6-4 and 16-6-5. Craft v. State, 324 Ga. App. 7, 749 S.E.2d 16 (2013).

There was sufficient evidence that the defendant took a substantial step toward committing the crime of enticing a child for indecent proposes, as a rational trier of fact could have reasonably inferred that the defendant was attempting to entice the children to move away from the apartment door and go to another place to have sex with the defendant when the defendant asked them if they wanted to have sex. Budeanu v. State, 325 Ga. App. 177, 751 S.E.2d 924 (2013).

Second victim's testimony that the defendant took the second victim for a ride in the defendant's car, the defendant pulled over on the side of the road and kissed the second victim and told the second victim the defendant wanted to see the second victim's breasts was sufficient to support the defendant's conviction for child enticement. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Instructions did not cause prejudicial error.

Trial court did not err in charging the jury on the full statutory definition of enticing a child for indecent purposes, O.C.G.A. § 16-6-5, even though the indictment only alleged that the defendant "took" the child and not that the defendant "enticed" or "solicited" the child because the charge as a whole limited the jury's consideration to the specific manner of committing the crime alleged in the indictment. Wheeler v. State, 327 Ga. App. 313, 758 S.E.2d 840 (2014).

Venue.

Based on the allegation that the child enticement was accomplished through an online chat service, venue was not limited to the defendant's physical location at the time the defendant used the service; the state had to prove only that the enticement occurred in White County, and the investigator testified that the investigator was located in White County when the investigator posed as a child to communicate online with the defendant. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Severance of offenses. — Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. Heck v. State, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Defense counsel not ineffective. — As to the defendant's convictions for child molestation, sexual battery, and enticing a child for indecent purposes, the defendant failed to establish that trial counsel's performance prejudiced the defense for failing to investigate the victim receiving prior parental discipline as trial counsel got the victim to admit to being afraid of getting into trouble for coming home late on the night of the incident. Carstaffin v. State, 323 Ga. App. 354, 743 S.E.2d 605 (2013).

With regard to the defendant's conviction for enticing a child, the trial court properly denied the defendant's motion for a new trial based on ineffective assistance because: trial counsel testified at the motion for new trial hearing that the defendant agreed to the strategic defense that no sexual contact was made with the vic-

tim and since the defendant did not testify at the hearing, the defendant did not show that trial counsel was deficient in advising the defendant of the constitutional right to testify; furthermore, the argument that trial counsel was deficient for failing to interview the victim and agreeing to stipulate that the defendant drove the victim to the park because trial counsel stated that the defendant agreed to the strategy of keeping the victim off the stand and to stipulate to the victim's age was also without merit. Stevens v. State, 329 Ga. App. 91, 762 S.E.2d 833 (2014).

Sentence.

In a case in which the defendant appealed the defendant's 54-month sentence for violating 8 U.S.C. § 1326(a) and (b)(2), the defendant unsuccessfully argued that the sentence was substantively unreasonable. The district court properly applied 16-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii) based on the defendant's guilty plea to violating O.C.G.A. § 16-6-5(a), and it was immaterial that the Georgia conviction was based on an Alford plea. United States v. Ramirez-Gonzalez, 755 F.3d 1267 (11th Cir. 2014).

Sentence enhancement under U.S.C. — In a case in which the defendant appealed the defendant's 54-month sentence for violating 8 U.S.C. § 1326(a) and (b)(2), a district court did not err by enhancing the defendant's offense level by 16 levels under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii) since the defendant's conviction for enticing a child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), qualified as sexual abuse of a minor and, therefore, a crime of violence. United States v. Ramirez-Gonzalez, 755 F.3d 1267 (11th Cir. 2014).

First offender consideration not appropriate. — Because the defendant was not entitled to first offender treatment for the crimes of child molestation and enticing a child for indecent purposes, to which the defendant pled guilty, the defendant's claims that trial counsel was deficient for misinforming the defendant about the defendant's eligibility for and failing to request first offender treatment were without merit. Harris v. State, 325 Ga. App. 568, 754 S.E.2d 148 (2014).

Cited in Bolton v. State, 310 Ga. App. 801, 714 S.E.2d 377 (2011); Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

RESEARCH REFERENCES

ALR. — Construction and application of U.S. Sentencing Guideline § 2g1.3(b)(3), providing two-level enhancement for use of computer to persuade, induce, entice, coerce, or facilitate the travel of minor to engage in prohibited sexual conduct, 58 ALR Fed. 2d 1.

16-6-5.1. Sexual assault by persons with supervisory or disciplinary authority; sexual assault by practitioner of psychotherapy against patient; consent not a defense; penalty upon conviction for sexual assault.

(a) As used in this Code section, the term:

(1) "Actor" means a person accused of sexual assault.

(2) "Intimate parts" means the genital area, groin, inner thighs, buttocks, or breasts of a person.

(3) "Psychotherapy" means the professional treatment or counseling of a mental or emotional illness, symptom, or condition.

(4) "Sexual contact" means any contact between the actor and a person not married to the actor involving the intimate parts of either person for the purpose of sexual gratification of the actor.

(5) "School" means any educational program or institution instructing children at any level, pre-kindergarten through twelfth grade, or the equivalent thereof if grade divisions are not used.

(b) A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person:

(1) Is a teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school; provided, however, that such contact shall not be prohibited when the actor is married to such other individual;

(2) Is an employee or agent of any community supervision office, county juvenile probation office, Department of Juvenile Justice juvenile probation office, or probation office under Article 6 of Chapter 8 of Title 42 and engages in sexual contact with such other individual who the actor knew or should have known is a probationer or parolee under the supervision of the such office;

(3) Is an employee or agent of a law enforcement agency and engages in sexual contact with such other individual who the actor knew or should have known is being detained by or is in the custody of any law enforcement agency;

(4) Is an employee or agent of a hospital and engages in sexual contact with such other individual who the actor knew or should have known is a patient or is being detained in the same hospital; or

(5) Is an employee or agent of a correctional facility, juvenile detention facility, facility providing services to a person with a disability, as such term is defined in Code Section 37-1-1, or a facility providing child welfare and youth services, as such term is defined in Code Section 49-5-3, who engages in sexual contact with such other individual who the actor knew or should have known is in the custody of such facility.

(c) A person who is an actual or purported practitioner of psychotherapy commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known is the subject of the actor's actual or purported treatment or counseling or the actor uses the treatment or counseling relationship to facilitate sexual contact between the actor and such individual.

(d) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under Code Section 31-7-3, 31-7-12,

or 31-7-12.2 or who is required to be licensed pursuant to Code Section 31-7-151 or 31-7-173 commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known had been admitted to or is receiving services from such facility or the actor.

(e) Consent of the victim shall not be a defense to a prosecution under this Code section.

(f) A person convicted of sexual assault shall be punished by imprisonment for not less than one nor more than 25 years or by a fine not to exceed $100,000.00, or both; provided, however, that:

(1) Except as provided in paragraph (2) of this subsection, any person convicted of the offense of sexual assault of a child under the age of 16 years shall be punished by imprisonment for not less than 25 nor more than 50 years and shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2; and

(2) If at the time of the offense the victim of the offense is at least 14 years of age but less than 16 years of age and the actor is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Code 1981, § 16-6-5.1, enacted by Ga. L. 1983, p. 721, § 1; Ga. L. 1990, p. 1003, § 1; Ga. L. 1991, p. 1108, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1992, p. 1940, § 1; Ga. L. 1999, p. 562, § 5; Ga. L. 2006, p. 379, § 13/HB 1059; Ga. L. 2010, p. 168, § 2/HB 571; Ga. L. 2011, p. 227, § 5/SB 178; Ga. L. 2015, p. 422, § 5-20/HB 310.)

The 2015 amendment, effective July 1, 2015, in paragraph (b)(2), substituted "community supervision office, county juvenile probation office, Department of Juvenile Justice juvenile probation office, or probation office under Article 6 of Chapter 8 of Title 42" for "probation or parole office" near the beginning and substituted "such office" for "same probation or parole office" at the end. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Indictment dismissed where defendant was not administrator at school. — Trial court did not err in dismissing the indictment against the defendant charging the defendant with six counts of sexual assault against a person in custody based on the defendant's sexual contact with three students at the high school where the defendant was employed because the defendant's job as a secretary at the school was strictly clerical in nature and did not fall within the definition of an administrator. State v. Hammonds, 325 Ga. App. 815, 755 S.E.2d 214 (2014).

Indictment dismissed where defendant was mere employee or agent of school. — Trial court did not err in dismissing the indictment against the defendant charging the defendant with six counts of sexual assault against a person in custody based on the defendant's sexual contact with three male students at the

high school where the defendant was employed because the classification of individuals who may be prosecuted in the education setting is limited to teachers, principals, assistant principals, or other administrators of the school, and a mere employee or agent of the school, such as the defendant, is not subject to prosecution. State v. Hammonds, 325 Ga. App. 815, 755 S.E.2d 214 (2014).

Indictment dismissed where defendant had no supervisory or disciplinary authority. — Trial court did not err in dismissing the indictment against the defendant charging the defendant with six counts of sexual assault against a person in custody based on the defendant's sexual contact with three male students at the high school where the defendant was employed because, even if the defendant could be considered a teacher by virtue of the defendant's position as an assistant cheerleading coach, any supervisory or disciplinary responsibilities the defendant might have had would have been confined to the members of the junior varsity cheerleading team of which the three male students were not members. State v. Hammonds, 325 Ga. App. 815, 755 S.E.2d 214 (2014).

Evidence sufficient for conviction.

Because the defendant, as a respiratory therapist, assessed the patients, decided what treatments would be used per certain protocols, and directed the patients while the treatments were performed, the defendant had the requisite supervisory authority over the patients the defendant treated sufficient to sustain the defendant's convictions for sexual assault against a patient in a hospital while the defendant had supervisory authority over the victims. Ellis v. State, 324 Ga. App. 497, 751 S.E.2d 129 (2013).

Jury instruction only on supervisory authority appropriate. — Because the defendant was only indicted for sexual assault against a patient in a hospital for engaging in sexual contact while the victims were patients in the hospital and while the defendant had supervisory authority over the victims, and the defendant was not charged with having disciplinary authority over the victims, the trial court did not err in the court's charge by providing the jury with only the definition of supervisory authority. Ellis v. State, 324 Ga. App. 497, 751 S.E.2d 129 (2013).

16-6-8. Public indecency.

JUDICIAL DECISIONS

Jail was not public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

Evidence sufficient to support conviction.

Evidence establishing that a witness noticed the defendant masturbating on a bench outside a mall department store and could clearly see the defendant's exposed penis was sufficient to support the defendant's conviction for public indecency by a lewd exposure of the defendant's sexual organs. Douglas v. State, 330 Ga. App. 549, 768 S.E.2d 526 (2015).

Jury instruction failing to define "public place". — Failure to instruct the jury on the definition of "public place" did not amount to plain error as the defendant's genitalia were clearly exposed on a bench outside a shopping mall and seen by a person unrelated to the defendant. Douglas v. State, 330 Ga. App. 549, 768 S.E.2d 526 (2015).

Public drunkeness not included in crime of public indecency. — With regard to the defendant's conviction for felony public indecency for urinating in public, the trial court's refusal to charge the jury on public drunkenness as a lesser included offense of public indecency was not error because the crime of public drunkenness requires proof that the defendant was intoxicated, which the crime of public indecency does not; the crime of

public drunkenness does not require a lewd exposure of sexual organs, which is required by the crime of public indecency; and, the crime of public indecency requires proof of exposure of sexual organs, which the crime of public drunkenness does not; therefore the offense of public drunkeness was not included in the crime of public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Cited in Nichols v. State, 325 Ga. App. 790, 755 S.E.2d 33 (2014); Stevens v. State, 329 Ga. App. 91, 762 S.E.2d 833 (2014).

RESEARCH REFERENCES

ALR. — Validity of state and municipal indecent exposure statutes and ordinances, 71 ALR6th 283.

16-6-10. Keeping a place of prostitution.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence insufficient for conviction. — In a trial for keeping a place of prostitution, in violation of O.C.G.A. § 16-6-10, a search warrant affidavit, which contained hearsay statements from a neighborhood group purportedly linking defendant's residence to prostitution, was not admissible as original evidence to explain to the jury why the officers were investigating defendant's residence. Given that the case was entirely circumstantial, the remaining competent evidence was insufficient evidence to support the conviction. Smoot v. State, 316 Ga. App. 102, 729 S.E.2d 416 (2012).

16-6-11. Pimping.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence supported probable cause. — Probable cause existed to arrest the defendant for pimping after the officer had sufficient facts to reasonably believe that the defendant drove the escort to the hotel and that the defendant knew, or should have known, that the escort was engaging in prostitution at the hotel. United States v. Daniels, No. 1:13-cr-454-WSD, 2015 U.S. Dist. LEXIS 15291 (N.D. Ga. Feb. 9, 2015).

16-6-12. Pandering.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

16-6-13.1. Testing for sexually transmitted diseases required.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

16-6-13.2. Civil forfeiture of motor vehicle.

(a) As used in this Code section, the term "motor vehicle" shall have the same meaning as set forth in Code Section 40-1-1.

(b) Any motor vehicle used when the offense involved the pimping of a person to perform an act of prostitution, by a person to facilitate a violation of Code Section 16-6-10, 16-6-11, 16-6-12, or 16-6-14 is declared to be contraband and no person shall have a property right in it.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9. (Code 1981, § 16-6-13.2, enacted by Ga. L. 2015, p. 675, § 5B-1/SB 8 and Ga. L. 2015, p. 693, § 2-3/HB 233.)

Effective date. — This Code section became effective July 1, 2015. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 675, § 5B-1/SB 8 and Ga. L. 2015, p. 693, § 2-3/HB 233, repealed former Code Section 16-6-13.2, pertaining to defined terms, prosecution, forfeiture and seizure of property, in rem action, intervention, court authority, civil proceedings, and liberal construction, and enacted the present Code section. The former Code section was based on Code 1981, § 16-6-13.2, enacted by Ga. L. 1999, p. 472, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 94, § 3; Ga. L. 2001, p. 362, § 29.

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 6-1(c)(1)/SB 8, not codified by the General Assembly, provides that: "Part 5B of this Act shall become effective on July 1, 2015, only if HB 233 is enacted by the General Assembly and becomes law in 2015, in which event Part 5A of this Act shall not become effective and shall stand repealed on July 1, 2015." HB 233 was enacted at the 2015 General Assembly and became effective July 1, 2015.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

16-6-13.3. Civil forfeiture of proceeds and property.

(a) As used in this Code section, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(b) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of Code Section 16-6-10, 16-6-11, 16-6-12, or 16-6-14 and any proceeds are declared to be contraband and no person shall have a property right in them.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9. (Code 1981, § 16-6-13.3, enacted by Ga. L. 2015, p. 675, § 5B-1/SB 8 and Ga. L. 2015, p. 693, § 2-4/HB 233.)

Effective date. — This Code section became effective July 1, 2015. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 675, § 5B-2/SB 8 and Ga. L. 2015, p. 693, § 2-4/HB 233, repealed former Code Section 16-6-13.3, pertaining to proceeds from pimping, forfeiture, and distribution, and enacted the present Code section. The former Code section was based on Code 1981, § 16-6-13.3, enacted by Ga. L. 2001, p. 94, § 4; Ga. L. 2003, p. 140, § 16.

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 6-1(c)(1)/SB 8, not codified by the General Assembly, provides that: "Part 5B of this Act shall become effective on July 1, 2015, only if HB 233 is enacted by the General Assembly and becomes law in 2015, in which event Part 5A of this Act shall not become effective and shall stand repealed on July 1, 2015." HB 233 was enacted at the 2015 General Assembly and became effective July 1, 2015.

Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

16-6-15. Solicitation of sodomy.

JUDICIAL DECISIONS

Constitutionality.

To the extent the solicitation of sodomy statute can be narrowly construed to only punish speech soliciting sodomy that is not protected by the Georgia Constitution's right to privacy, the solicitation of sodomy statute is constitutional. Watson v. State, 293 Ga. 817, 750 S.E.2d 143 (2013).

Evidence sufficient for conviction.

Victim's testimony was sufficient to sustain the defendant's conviction for solicitation of sodomy in violation of O.C.G.A. § 16-6-15(a) because the victim testified that the defendant offered to give the victim money for oral sex. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Evidence insufficient for conviction. — Although the defendant clearly invited the 17-year-old boy to engage in sexual acts falling within the express language of the sodomy statute, the evidence was insufficient to convict the defendant of solicitation of sodomy as the defendant never suggested that any encounter occur in a public place; the mere fact that the defendant was a public officer, specifically

a police officer, did not render public the defendant's offer to engage in sex in a private residence; no money or anything of commercial value would be exchanged; the defendant's conduct did not rise to the level of intimidation or coercion that would give rise to a finding of sexual contact by force; and both parties were legally capable of consenting to sexual contact. Watson v. State, 293 Ga. 817, 750 S.E.2d 143 (2013).

16-6-18. Fornication.

JUDICIAL DECISIONS

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court's discretion. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Merger properly denied. — Trial court did not err in denying the defendant's request to merge the defendant's convictions for statutory rape and fornication for the purpose of sentencing because the defendant waived the issue of whether the offenses should have been merged when the defendant knowingly and voluntarily pled guilty to each of the crimes. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

16-6-19. Adultery.

Cross references. — General rule of competency, § 24-6-601.

16-6-22. Incest.

(a) A person commits the offense of incest when such person engages in sexual intercourse or sodomy, as such term is defined in Code Section 16-6-2, with a person whom he or she knows he or she is related to either by blood or by marriage as follows:

(1) Father and child or stepchild;

(2) Mother and child or stepchild;

(3) Siblings of the whole blood or of the half blood;

(4) Grandparent and grandchild of the whole blood or of the half blood;

(5) Aunt and niece or nephew of the whole blood or of the half blood; or

(6) Uncle and niece or nephew of the whole blood or of the half blood.

(b) A person convicted of the offense of incest shall be punished by imprisonment for not less than ten nor more than 30 years; provided,

however, that any person convicted of the offense of incest under this subsection with a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this Code section of the offense of incest shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2. (Laws 1833, Cobb's 1851 Digest, p. 814; Code 1863, § 4418; Code 1868, § 4459; Code 1873, § 4533; Code 1882, § 4533; Ga. L. 1886, p. 30, § 1; Penal Code 1895, § 380; Penal Code 1910, § 371; Ga. L. 1916, p. 51, § 1; Code 1933, § 26-5701; Code 1933, § 26-2006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2006, p. 379, § 14/HB 1059; Ga. L. 2010, p. 168, § 3/HB 571; Ga. L. 2015, p. 203, § 1-1/SB 72.)

The 2015 amendment, effective July 1, 2015, added "of the whole blood or of the half blood" in paragraphs (a)(4), (a)(5), and (a)(6).

JUDICIAL DECISIONS

Analysis

General Consideration

Variance between indictment and evidence not fatal.

Evidence was insufficient to support the defendant's incest conviction because the relationship at issue, the defendant being the victim's half-uncle, was not expressly enumerated by the statute. Gordon v. State, 327 Ga. App. 774, 761 S.E.2d 169 (2014).

Relationships

Adopted sibling. — Trial court erred when the court denied the defendant's motion to quash the count of an indictment charging the defendant with incest because the defendant did not commit incest since the defendant's adoptive sister was not a whole blood or half blood sibling; the incest statute does not prohibit sexual intercourse between a brother and an adoptive sister not related by blood. Smith v. State, 311 Ga. App. 757, 717 S.E.2d 280 (2011).

Evidence

Evidence held sufficient to convict.

Evidence was sufficient to support the defendant's conviction for incest in violation of O.C.G.A. § 16-6-22(a) because the victim testified that the defendant had sexual intercourse with the victim on a frequent basis for over six years, during which time the defendant was married to the victim's mother; the victim's cousin testified that the cousin was in the same room during one incident when the defendant and the victim had sexual intercourse. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Testimony from the victim and the victim's mother testified that the defendant was the victim's daughter, and the defendant's repeated testimony at trial was that the victim was the defendant's daughter was sufficient to prove consanguinity for purposes of the incest conviction. Wynn v. State, 322 Ga. App. 66, 744 S.E.2d 64 (2013).

16-6-22.1. Sexual battery.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011); Stevens v. State, 329 Ga. App. 91, 762 S.E.2d 833 (2014).

Application

Relationship to federal sentencing. — In a case in which a defendant pled guilty to violating 8 U.S.C. § 1326(a) and the defendant objected to a 16-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(iii) based on the defendant's conviction in Georgia of sexual battery of a victim under 16, in violation of O.C.G.A. § 16-6-22.1(d), the common definition of sexual abuse of a minor included as an element that the conduct be for a purpose associated with sexual gratification. However, the Georgia offense of sexual battery did not include that as an element; therefore, the Georgia crime of sexual battery under § 16-6-22.1 did not substantially correspond to the common definition of sexual abuse of a minor. United States v. Hernandez-Gonzalez, No. 5:11-CR-53, 2012 U.S. Dist. LEXIS 14797 (M.D. Ga. Jan. 31, 2012).

Child molestation and sexual battery.

Victim's testimony that the defendant pulled down the victim's pants, reached into the victim's underwear, fondled the victim's genitals, and touched them with the defendant's penis was sufficient to support the defendant's convictions for sexual battery and child molestation. Reid v. State, 319 Ga. App. 782, 738 S.E.2d 624 (2013).

Similar transactions evidence properly admitted.

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence sufficient for delinquency adjudication. — Evidence was sufficient to adjudicate the juvenile for felony sexual battery in violation of O.C.G.A. § 16-6-22.1; the juvenile court was faced with sufficient evidence to find that the juvenile was responsible for a sexual battery against the victim, who was a classmate of the defendant's and under the age of 16, by intentionally making unwanted physical contact with the victim's breast; the juvenile court was faced with conflicting testimony as to what occurred between the victim and the juvenile, and conflicts in the testimony were a matter of credibility for the trier of fact to resolve. In the Interest of D.D., 310 Ga. App. 329, 713 S.E.2d 440 (2011).

Evidence that the defendant, a respiratory therapist, touched the breast, buttocks, and genital area of the victims without the victim's consent supported the defendant's convictions for sexual battery. Ellis v. State, 324 Ga. App. 497, 751 S.E.2d 129 (2013).

Evidence sufficient for conviction.

Defendant was not entitled to a directed

Application (Cont'd)

verdict of acquittal on the charge of sexual battery because the defendant did not object when the third victim testified that the defendant touched the victim and made a gesture and the prosecution requested that the record reflect that the victim pointed to the victim's breast; thus, there was sufficient evidence to support the conviction. Ogletree v. State, 322 Ga. App. 103, 744 S.E.2d 96 (2013).

Based on the victim's testimony that the victim could not tell the defendant, the victim's step-father, out of fear, a rational trier of fact could have concluded that the defendant committed the acts of sexual battery without the consent of the victim. Madison v. State, 329 Ga. App. 856, 766 S.E.2d 206 (2014).

Defense counsel not ineffective. — As to the defendant's convictions for child molestation, sexual battery, and enticing a child for indecent purposes, the defendant failed to establish that trial counsel's performance prejudiced the defense for failing to investigate the victim receiving prior parental discipline as trial counsel got the victim to admit to being afraid of getting into trouble for coming home late on the night of the incident. Carstaffin v. State, 323 Ga. App. 354, 743 S.E.2d 605 (2013).

Jury Instructions

Charge on sexual battery not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim's vagina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because the defendant's defense was that the victim fabricated her claims. Smith v. State, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

16-6-22.2. Aggravated sexual battery.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Ashmore v. State, 323 Ga. App. 329, 746 S.E.2d 927 (2013); Nichols v. State, 325 Ga. App. 790, 755 S.E.2d 33 (2014); Calhoun v. State, 327 Ga. App. 683, 761 S.E.2d 91 (2014).

Application

Admissibility of evidence of similar offenses.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Evidence sufficient for conviction, etc.

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child moles-

tation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c) because the evidence not only included the victims' testimony, which was both direct evidence of their own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Physical evidence of the trauma to at least one victim, together with the consistency of the victims' statements to the outcry witnesses, law enforcement, and the forensic interviewer, the similar transaction testimony, and the evidence showing opportunity sufficed to establish each element of the charges of aggravated sexual battery and child molestation. Tudor v. State, 320 Ga. App. 487, 740 S.E.2d 231 (2013).

Defendant's aggravated sexual battery conviction was supported by the victim's testimony that the defendant "would finger her," and the testimony of a police investigator that the victim told the investigator that the defendant penetrated the victim's vaginal area with the defendant's fingers. Gordon v. State, 327 Ga. App. 774, 761 S.E.2d 169 (2014).

Sufficient evidence supported defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Victim's testimony that the defendant was fingering the victim and tried to spread the victim's legs more so that the defendant could put the defendant's fingers in deeper was sufficient to support a finding of penetration for purposes of the aggravated sexual battery conviction. Madison v. State, 329 Ga. App. 856, 766 S.E.2d 206 (2014).

Victim's testimony that the defendant touched the inside of the victim's vagina with the defendant's finger two or three times was sufficient to support the defendant's conviction for aggravated sexual battery. Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

Respiratory therapist guilty of sexual battery. — Victim's testimony that the defendant, a respiratory therapist, put a finger inside the victim's privates supported the aggravated sexual battery conviction. Ellis v. State, 324 Ga. App. 497, 751 S.E.2d 129 (2013).

Aggravated sexual battery and child molestation merged. — Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments, including the date, the victim, and the description of the defendant's conduct constituting the offense, were identical. The charges should have merged for sentencing. Hudson v. State, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Expert testimony. — With regard to defendant's conviction for child molestation and aggravated sexual battery, the trial court did not err by denying the motion for mistrial or motion for new trial based on the testimony of a forensic interviewer following the child victim's outcry in court about testifying because the forensic interviewer provided only general testimony concerning child abuse accommodation syndrome and the behaviors abused children often exhibit as a result of having been abused and did not testify that in her opinion the victim had been abused or that her inability to take the stand to testify against defendant was a result of having been abused by defendant. Canty v. State, 318 Ga. App. 13, 733 S.E.2d 64 (2012).

Application of rule of lenity. — Since the appellate court could not determine from the general verdict form the date of the act upon which the jury prounounced guilt, the rule of lenity applied and the defendant could not be given the higher sentence applciable to only a portion of the time alleged in the indictment. Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Jury Instructions

Jury charge proper.

Instruction that the defendant could be convicted of aggravated sexual battery by penetrating the sexual organ or the anus, when the indictment alleged penetration of the vagina, was not erroneous because the jury was instructed the jury could only convict the defendant for offenses charged in the indictment. Brown v. State, 315 Ga. App. 115, 726 S.E.2d 612 (2012), cert. denied, No. S12C1239, 2012 Ga. LEXIS 983 (Ga. 2012).

There was no plain error in the trial court's charge to the jury because the trial court gave an appropriate limiting instruction prior to the admission of the similar transaction evidence and because the purposes cited in the trial court's final charge were permissible and relevant to the state's case. Griffin v. State, 327 Ga. App. 751, 761 S.E.2d 146 (2014).

Charge on lesser offense not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim's vagina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because the defendant's defense was that the victim fabricated her claims. Smith v. State, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

Charge on accident as defense not warranted. — Trial court did not err in failing to charge the jury on accident as a defense to aggravated sexual battery as the defendant did not admit to the act of penetration and, thus, was not entitled to such an instruction. Davis v. State, 323 Ga. App. 266, 746 S.E.2d 890 (2013).

Sentence

Registration properly required. — Trial court properly convicted the defendant of failing to register as a sexual offender under O.C.G.A. § 42-1-12(e)(4) because the statute was not unconstitutionally vague absent the definition of the term sexually violent offense as it included offenses in violation of O.C.G.A. § 16-6-22.2 and the defendant admitted the defendant knew the defendant was required to register. Youmans v. State, 291 Ga. 754, 732 S.E.2d 441 (2012).

Merger. — Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. Gaston v. State, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

16-6-25. Harboring, concealing, or withholding information concerning a sexual offender; penalties.

(a) As used in this Code section, the term "law enforcement unit" means any agency, organ, or department of this state, or a subdivision or municipality thereof, whose primary functions include the enforcement of criminal or traffic laws; the preservation of public order; the protection of life and property; or the prevention, detection, or investigation of crime. Such term shall also include the Department of Corrections, the Department of Community Supervision, and the State Board of Pardons and Paroles.

(b) Any person who knows or reasonably believes that a sexual offender, as defined in Code Section 42-1-12, is not complying, or has not complied, with the requirements of Code Section 42-1-12 and who, with

the intent to assist such sexual offender in eluding a law enforcement unit that is seeking such sexual offender to question him or her about, or to arrest him or her for, his or her noncompliance with the requirements of Code Section 42-1-12:

(1) Harbors, attempts to harbor, or assists another person in harboring or attempting to harbor such sexual offender;

(2) Conceals, attempts to conceal, or assists another person in concealing or attempting to conceal such sexual offender; or

(3) Provides information to the law enforcement unit regarding such sexual offender which the person knows to be false information

commits a felony and shall be punished by imprisonment for not less than five nor more than 20 years. (Code 1981, § 16-6-25, enacted by Ga. L. 2006, p. 379, § 17/HB 1059; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2015, p. 422, § 5-21/HB 310.)

The 2015 amendment, effective July 1, 2015, inserted ", the Department of Community Supervision," in the last sentence in subsection (a). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."